TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 94

WM. G. LEWIS, TRUSTEE, PETITIONER,

vs.

MANUFACTURERS NATIONAL BANK OF DETROIT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

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WM. G. LEWIS, TRUSTEE, PETITIONER,

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 19, 1960

[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14,019

WM. G. LEWIS, Trustee in Bankruptcy, Appellant,

—vs.—

MANUFACTURERS NATIONAL BANK, a National Banking Corporation, Appellee.

In the Matter of:

TUDOR R. ALIKASOVICH, d/b/a MIAMI CLEANERS & TAILORS, Bankrupt.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Appendix for Appellant—Filed September 26, 1959

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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

STIPULATION OF FACTS ON PETITION FOR REVIEW FILED BY MANUFACTURERS NATIONAL BANK OF DETROIT—May 21, 1959

Bodman, Longley, Bogle, Armstrong & Dahling, attorneys for Petitioner, Manufacturers National Bank of Detroit, a national banking association, and Stuart E. Hertzberg, attorney for Wm. G. Lewis, Trustee and former Receiver of the Bankrupt, agree and stipulate to the following facts as the record on the Petition for Review:

Petitioner is the holder of a note secured by a chattel mortgage properly executed and delivered by the Bankrupt under date of November 4, 1957, covering a 1953 Pontiac automobile bearing serial number P8XH-47-321. The Bankrupt gave the note and chattel mortgage in exchange for a loan from the Petitioner made through its Grand River-Dundee branch office. After making a credit investigation of the Bankrupt, the proceeds of the loan were disbursed on November 5, 1957. On that date, the branch office forwarded the note and chattel mortgage to Petitioner's downtown Michigan-Griswold office where on November 6 and 7, 1957, it was reviewed for proper figures, interest rate, and signature, etc. and processed for credit life insurance on the Bankrupt, machine accounting records and filing. The chattel mortgage was then filed with the Wayne County Register of Deeds at 10:21 a.m. on November 8, 1957. Wayne County was the proper county for filing said mortgage. A copy of the note and mortgage is attached hereto as Exhibit 1 and made a part hereof.

There is now due and owing on the note and chattel mortgage a principal balance of $365.00 and interest at the rate of 7% per annum from and after November 15, 1958. No evidence was introduced as to the existence of a creditor of the Bankrupt who became such between the time of the execution and delivery of the chattel mortgage and the time of the filing of the chattel mortgage. On June 13, 1958, the

Honorable Harry G. Hackett, Referee in Bankruptcy, entered an Order declaring the chattel mortgage invalid and void as against the Receiver of the Bankrupt under Section 70e of the Bankruptcy Act. The Order extended the period for filing a Petition for Review for six (6) months from the date thereof, and an Order entered December 12, 1958, further extended such time until March 12, 1959. The Petition for Review was filed December 30, 1958.

[fol. 3]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF ORDER DECLARING MANUFACTURERS' NATIONAL BANK'S LIEN INVALID—Filed June 17, 1959

I, Harry G. Hackett, one of the Referees of this Court, do hereby certify that in the course of proceedings in said Cause before me, upon hearing of the Order to Show Cause issued on April 25, 1958, pursuant to petition of Wm. G. Lewis, Receiver, and the Answer thereto of Respondent, Manufacturers' National Bank, filed May 6, 1958, the following questions were presented.

Questions for Review

Did Respondent's failure to record its chattel mortgage from November 4, 1958 to November 8, 1958, render the same void as against the Receiver?

Does Section 70e, of the Bankruptcy Act, dispense with the necessity of proving that a creditor actually extended credit to the bankrupt while Respondent's mortgage was off record?

Does Section 70e, of the Bankruptcy Act, clothe the Trustee with the rights of a creditor who could have, under State Law, extended credit even though no such creditor exists?

Findings of Fact

1. No testimony was taken and no controversy exists as to the facts, and based upon stipulation the facts are as follows:

   On November 4, 1957, the Bankrupt executed and delivered a note and chattel mortgage covering a 1953 Pontiac automobile, owned by him, to the Respondent, Manufacturer's National Bank. Disbursement was made thereon on November 5, 1957 but the mortgage was not recorded until November 8, 1957, or four (4) days after its execution.

   The Receiver contended that failure to record the chattel mortgage immediately rendered the same void as against him.

Your Referee, upon reading Section 70c, of the Bankruptcy Act, which provides that:

"The Trustee, as to all property, of the bankrupt at the date of bankruptcy whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings whether or not such a creditor exists";

made the following conclusions of law.

[fol. 4] *Conclusions of Law*

Michigan Statutes Annotated, 26.929, as amended by Public Act 233, September 27, 1957, provides that:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mort-

gagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides. * * * Provided, however, That no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage. * * * "

As stated before, Section 70c clothes the Trustee with the rights of a creditor who could have obtained a lien at the date of bankruptcy whether or not such a creditor exists. Thus, we are remitted to the law of this State to determine if a creditor could have obtained a lien upon the automobile involved at the time the bankrupt filed his petition. Your Referee held that since M. S. A., 26.929 allows fourteen (14) days in which to record purchase money mortgages without mentioning any specific period of time within which to file non-purchase money mortgages, that the latter must be filed immediately. Indeed, the Court of Appeals for the Sixth Circuit, in the case of General Motors Acceptance Corporation v. Collier, 106 F. 2d 584, decided before the statute was amended following fourteen (14) days for recording of purchase money mortgages, held that recording must be immediate.

Under Michigan law any creditor who extends credit to a mortgagor while an outstanding mortgage against his property is off record becomes vested with rights superior to those of the mortgagee, which cannot be defeated by subsequent filing of the mortgage or by the mortgagee subsequent taking possession. See Ransom and Randolph Company v. Moore, 272 Michigan 31; Fearey v. Cummings, 41 Michigan 376; O'Neil against Brooks, 180 Michigan 540. See also, In Re Plymouth Glass Company; United States District Court, Eastern District of Michigan, Southern Division, No. 38063.

Your Referee held that since the mortgage involved herein [fol. 5] was off record for four (4) days, a creditor could have extended credit during that period thereby becoming

vested with rights, under Michigan law, not subject to be defeated by subsequent filing of the mortgage by the mortgagee. And, since the Trustee is vested with those rights, under Section 70c, the mortgage was void as to him.

The following documents are attached to the Certificate to facilitate review by the Honorable Judge.

1. Petition of Receiver for Order to Show Cause, and Order entered thereon directed to Manufacturers National Bank and others, filed April 25, 1958.
2. Response of Manufacturers' National Bank to Order to Show Cause, filed May 6, 1958.
3. Order re: validity of chattel mortgage entered by your Referee on June 13, 1958.
4. Stipulation of Facts on Petition for Review filed May 26, 1959.

The original of the Petition for Review is on file in the Office of the Clerk of the United States District Court, and therefore, no copy thereof is attached.

/s/ Harry G. Hackett
Referee in Bankruptcy

[fol. 6]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OPINION—July 27, 1959

Statement of Facts

Mortgagee petitions review of Bankruptcy Referee's order holding chattel mortgage void. The facts are these:

On November 4, 1957, bankrupt executed and delivered to respondent, Manufacturer's National Bank, a note and chattel mortgage covering a 1953 Pontiac automobile owned by him. Disbursement was made thereon November 5, 1957, but the mortgage was not recorded until November 8, 1957,

or four days after its execution. The bankrupt filed his petition April 18, 1958. The receiver contended inter alia that failure to record the chattel mortgage immediately rendered the same void as against him. Referee's determination of invalidity was founded on two conclusions:

1—That M.S.A. 26.929 "allows" 14 days within which to record purchase money mortgages, but fails to mention a permissive time in other cases, hence non-purchase-money mortgages are void unless filed "immediately".

2—That under Michigan law a creditor could have intervened the time the mortgage was off-record, that his rights would not be defeated by subsequent recording, and that under Sec. 70(c) the trustee stands in his stead whether or not such creditor exists.

Conclusions of Law

First: This is admittedly not a purchase money mortgage.

Second: The Michigan Statute reads—

M.S.A. Sec. 26.929

"Every mortgage . . . of goods and chattels . . . which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession . . . *shall be absolutely void* as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, *unless* the mortgage or a true copy thereof *shall be filed* in the office of the register of deeds. . . . Provided, however, *That no purchase money mortgage shall be void as against the creditors* of the mortgagor *if* filed within 14 days from the date of the execution of such mortgage." (Emphasis ours.)

Similarly Sec. 26.922 provides conditions under which agreements shall be void unless they be in writing. But, as this language does not operate to void written contracts because they previously were oral, it does not void recorded documents because they previously were unrecorded.

[fol. 7] The courts have held that—

> "... the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage." Detroit Trust Co. v. Pontiac Savings Bank, 196 F. 29, p. 33.

See also Peter Schuttler Co. v. Gunther, 222 Mich. 430, 192 N.W. 661; Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 247 N.W. 76, and cases cited therein. General Motors Acceptance Corporation v. Coller, 106 F. 2d 584, relied on by the referee, conforms to this result.

Since no creditors, mortgagees or purchasers intervened November 4 and 8, 1957, and since no prior creditors perfected liens during that time, the mortgage was not void under state law.

The chief question is what rights are acquired by the trustee under Section 70(c). Had creditors intervened, they could have voided the mortgage as discussed above, and the trustee would be placed in their position to effectuate this object. Deane v. Fidelity Corporation of Michigan, 82 F. Supp. 710; In Re Cotter, 113 F. Supp. 859. Also, if the lien were unrecorded as of the date of filing petition in bankruptcy, the mortgage would be voided. In re Urban, 136 F. 296. To otherwise void the mortgage under the Michigan Statutes, the trustee must either be placed in the status of a non-existing intervening creditor, or the status of a creditor at the time the mortgage was off-record. Bankruptcy Act Section 70(c) puts him in neither position. It provides:

> "The trustee, as to all property, (of the bankrupt at the date of bankruptcy) whether or not coming into possession or control of the court, upon which a *creditor of the bankrupt could have obtained a lien* by legal or equitable proceedings *at the date of bankruptcy*, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by ... such proceedings, whether or not such a creditor exists." (Emphasis ours.)

Patently the position of a creditor with a right to perfect a lien while the mortgage was off-record is precluded because the trustee indisputably is vested as of the *date of bankruptcy,* with rights to property upon which a creditor could have obtained a lien *at that date* only.

Trustee argues that he is placed in the position of an intervening creditor, whether or not such exists, and who has perfected a lien, whether he has done so or not. Let [fol. 8] us follow the history of this section. The former, 1950, amendment read:

> "... The trustee, as to *all* property ... shall be deemed vested as of the date of bankruptcy with all the rights, ... of a creditor then holding a lien thereon ... whether or not such a creditor actually exists." (Emphasis ours.)

Particularly with the understanding of the former impediment that confronted trustees, (See Security Warehousing Co. v. Hand, 206 U.S. 415) we fail to see how this can be read as doing more than vesting trustee with lien rights whether or not there exists a creditor—"then holding a lien." It does not put him in that position "whether or not a creditor could obtain a lien."

But the 1952 amendment removes all doubt, vesting him with rights to property only—

> "upon which a creditor of the bankrupt could have obtained a lien ..."

And to reach the contended construction we would have to read this qualification entirely out of the section, for to say trustee is vested as to property—

> "upon which a creditor of the bankrupt could have obtained a lien, whether he could obtain a lien or not"

is contradictory and renders the qualification impotent. The legislative intent appears to have been to leave property to which trustee is vested with title under Section 70(a) subject to attack under Section 70(e), wherein the test of voidability is voidability under the appropriate State or

Federal law; and to apply Section 70(c) solely to property not covered thereby. House Report No. 2320 on S. 2234, 82nd Congress, 2nd Sess. (1952) 2, explains the amendment—

> ". . . trustee already has title to all the bankrupt's property, and *it is not proper to say that he has rights of a lien creditor upon his own property.* What should be said is that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner." (Emphasis ours.)

Constance v. Harvey, 215 F. 2d 571 (CA-2), followed in Conti v. Volper, 229 F. 2d 317 (also reported as In Re Gondola Associates, 132 F. Supp. 205) is the strongest case cited and is urged as the primary authority for substantiating trustee's position. There the mortgage was unrecorded almost a year and was found not to be recorded "within a reasonable time" as required by New York law. [fol. 9] Originally the Circuit Court remanded the case to determine whether the mortgage was recorded prior to the filing of bankruptcy petition and prior to intervention of creditors. A month later, sua sponte, the court reversed its result with the following language:

> "*Since an existing creditor* . . . could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under Sec. 70, sub. c of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor . . . we think his position must prevail . . ."

It is not clear whether the court meant, as a finding of fact, that under New York law a creditor did exist who could have obtained a lien, and since he existed, the trustee was in his shoes; or whether the court meant, as a matter of law, that since such a creditor could exist, the trustee was in his shoes. In Conti v. Volper, supra, it was interpreted as making the legal, not factual, conclusion and applied to a situation where no creditors did exist.

See also In Re Billings, 170 F. Supp. 253 for a like construction. If the Constance case is based upon an interpre-

tation of New York law, which we believe it is, it is entirely inapplicable here, the question of whether the mortgage is filed within a "reasonable time" being immaterial under the Michigan Statute. See In Re Varratos, 159 F. Supp. 730, (D.C. N.Y.) affirmed 259 F. 2d 920 (CA-2), and In Re American Textile Printers Co., 152 F. Supp. 901.

At best the Constance case is the ambiguous statement of another Circuit which we are constrained not to follow in view of the present clear wording of the Act itself to th contrary effect, the legislative intent as expressed in th House Report, supra, and to the utter lack of evidence of legislative intent to create the broad inequities that would commonly follow its application.

This court is aware that Bankruptcy Act Section 70(c) has been of great help in the past, under a rather strict interpretation, in achieving equity and justice in bankruptcy cases. However, a close analysis of those cases will reveal that it has usually not been utilized except where the possibility or probability of fraud was present.

Furthermore, if such a strict interpretation is followed, as made by the Bankruptcy Court, it will mean the end of a very salient and important feature of our economics—[fol. 10] banking and otherwise. Four days is certainly not an unreasonable time to pass between the giving of a mortgage and its recording and surely no court can take that position. In Brown, Trustee v. Atlantic Bank of New York, 259 F. 2d 920, the mortgage filed seven days after being given was not unreasonable unless so found by the court. If this is important, we hold to the contrary. Here we find four days not unreasonable. And, if so, where is the limit and what about the duty of the loaner who is handling other people's money to check up on investments made with that money? Here a long time elapsed between the giving of the mortgage and the day bankrupt's petition was filed. But only four days between the giving and filing of the mortgage. Congress never intended an interpretation that would handicap business and certainly not one which would seek to give an advantage to creditors such as would happen here if the trustee were to be in the position at all times of a hypothetical creditor who does not and never did exist. Would not this be "unjust enrichment" for the other

creditors? We doubt very much that any interpretation such as advocated by the trustee can meet the test of constitutionality that might be suggested here, as long as it is legal to take a mortgage for money loaned. This is legal in Michigan. In fact we don't know of any place in the world where it isn't legal. Being legal we should not give a strained interpretation of the Bankruptcy Act to deprive the loaner not only of the fruits of his loan but of the very loan itself.

For these reasons we hold that the mortgage herein is valid and this matter is hereby remanded to the Referee for further proceedings in conformity herewith. An order to that effect should be presented for the court's signature.

Frank A. Picard
United States District Judge

Dated: July 27, 1959

[fol. 11]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ORDER ALLOWING PETITION FOR REVIEW BY MANUFACTURERS NATIONAL BANK OF DETROIT AND REVERSING REFEREE'S ORDER—August 13, 1959

On December 30, 1958, Manufacturers National Bank of Detroit, a national banking association, filed a Petition for Review of an Order entered June 13, 1958, by the Honorable Harry G. Hackett, Referee in Bankruptcy, declaring a chattel mortgage of the Petitioner invalid and void as against the Receiver of the Bankrupt under Section 70(c) of the Bankruptcy Act.

The Petitioner and Trustee have submitted this matter to the Court on briefs, waiving oral argument and the Court, after due consideration and being fully advised in the premises, announced its decision by Opinion dated July 27, 1959. In conformity with such Opinion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner's chattel mortgage dated November 4, 1957 is valid

under Michigan law and cannot be avoided by the Receiver or Trustee of the bankrupt proceeding under Section 70(c) of the Bankruptcy Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Order entered July 13, 1958 by the Honorable Harry G. Hackett be and is hereby reversed and this matter be and hereby is remanded to said Referee for further proceedings in accordance with this Order and the Opinion of this Court dated July 27, 1959.

Frank A. Picard
District Judge

Dated: August 13, 1959.

[fol. 12] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—February 4, 1960 (omitted in printing).

[fol. 13] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14,019

In the Matter of:

TODOR R. ALIKASOVICH, d/b/a MIAMI CLEANERS & TAILORS, Bankrupt,

WM. G. LEWIS, Trustee in Bankruptcy, Appellant,

vs.

MANUFACTURERS NATIONAL BANK OF DETROIT, a National Banking Association, Appellee.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION—Decided March 7, 1960

Before: Cecil, Pope and Weick, Circuit Judges.

Weick, Circuit Judge. This case involves the validity of a chattel mortgage on an automobile as against the claims of the trustee in bankruptcy of the mortgagor.

Prior to bankruptcy, the bankrupt had borrowed money from Manufacturers National Bank of Detroit, Michigan. To evidence the loan and secure its payment on November 4, 1957 he executed and delivered to the bank a promissory note and chattel mortgage on his 1953 Pontiac automobile. The proceeds of the loan were disbursed on the following day. The papers were then forwarded from the bank's branch office, where the loan had been made, to its downtown office for processing and recording of the mortgage. The chattel mortgage was filed by the bank with the [fol. 14] Wayne County Register of Deeds on November 8, 1957.

About five months later, namely, April 18, 1958 the borrower filed a voluntary petition in bankruptcy in the District Court upon which an adjudication in Bankruptcy was duly entered.

The referee in bankruptcy held that the mortgage was void as against the trustee in bankruptcy. The District Judge reversed the order of the referee and the trustee in bankruptcy has appealed to this Court.

The pertinent provision of Michigan Statutes Annotated, 26.929, as amended by Public Act 233, September 27, 1957 relating to the recording of chattel mortgages is as follows:

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides. . . . Provided, however, that no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage. . . ."

The last proviso in the statute is the amendment of September 27, 1957. Obviously, it has no application to the

present case since the chattel mortgage was not a purchase money mortgage.

The Michigan statute has been construed to require the chattel mortgage to be filed immediately with the Register of Deeds. *General Motors Acceptance Corp.* v. *Coller*, 106 F. 2d 584 (C. A. 6, 1939). Unless so filed, the chattel mortgage is void as against creditors who extended credit in the interim between the date of the instrument and its filing for record. *Trailmobile, Inc.* v. *Wiseman, Trustee*, 244 F. 2d 76 (C. A. 6, 1957); *Klingensmith* v. *James B. Clow & Sons*, 270 Mich. 460 (1935); *Ransom & Randolph Co.* v. *Moore*, 272 Mich. 31 (1935); *Burroughs Adding Machine Co.* v. [fol. 15] *Wieselberg*, 230 Mich. 15 (1925); *O'Neil* v. *Brooks*, 180 Mich. 540 (1914); *Fearey* v. *Cummings*, 41 Mich. 376 (1879); Cf. *Moore* v. *Bay*, 284 U. S. 4 (1931).

There was no evidence that any creditor had extended credit to the bankrupt between the date of the mortgage and its recording four days later. Since no creditors had intervened in the present case, the chattel mortgage of the bank was valid and unassailable under Michigan law. If any imperfection had existed in the mortgage it had become perfected long before bankruptcy.

The trustee in bankruptcy contends that although unassailable under state law, the chattel mortgage was void by reason of the provisions of Section 70 subsection (c) of the Bankruptcy Act[1] which gave to the trustee the status of a perfect hypothetical creditor and, therefore, the case must be considered as if a creditor did exist in the interim period.

The trustee relies on *Constance* v. *Harvey*, 215 F. 2d 571 (C. A. 2, 1954), cert. denied 348 U. S. 913, which involved the validity of a chattel mortgage under New York law. As judicially construed, the New York statute granted a reasonable time to file the mortgage after its execution.

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[1] "The Trustee, as to all property, whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor exists" (11 U. S. C. A. ¶ 110c).

In that case over 10 months had elapsed between the date of the mortgage and its filing for record which the court said was not within a reasonable time. No creditor, however, had intervened in the interim. The court held the mortgage void under Section 70, subsection (c) of the Bankruptcy Act.[2] The court said:

> "Since an existing creditor without notice of the chattel mortgage could have obtained a lien at the time of the filing of the petition in bankruptcy, and since Section 70, subsection (c) of the Bankruptcy Act the trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—Hoffman v. Cream-O-Products, 180 F. 2d 649 (C. A. 2, 1950), cert. denied 340 U. S. 815 (1950) we think his position must prevail over that of the mortgagee-appellant."

[fol. 16] The trouble with *Constance* v. *Harvey*, in our judgment, was in the retroactive extension of the rights of the trustee in bankruptcy to include those of a creditor which did not in fact exist as of a period almost one year prior to bankruptcy. The critical time for the accrual of the trustee's rights under Section 70c is "at the date of bankruptcy" not prior thereto. The trustee can only be "vested as of such date" with the rights of a creditor "then holding a lien whether or not such a creditor actually exists." This means a creditor at that time and not prior thereto. Before *Constance* v. *Harvey*, it had always been understood that the trustee's rights under Section 70c accrued as of the date of bankruptcy and not earlier. There is nothing in the section giving to either the trustee or a creditor rights antecedent to bankruptcy.

The rights and remedies of the trustee under Section 70, subsection (e) of the Bankruptcy Act to reach fraudulent or otherwise invalid transfers or encumbrances must not be confused with his rights under Section 70, subsection (c). While Section 70, subsection (e) would permit a trustee to reach invalid transfers or encumbrances whenever they

[2] The court originally held the mortgage to be valid. On petition for rehearing, the court, sua sponte, reversed its original position and held the mortgage void under ¶ 70c.

arose, it would afford no remedy here where the lien of the chattel mortgage had been perfected and was valid against creditors long before bankruptcy.

Section 70, subsection (c) gives the trustee the status of a lien creditor as of the date of bankruptcy regardless of whether or not such a creditor existed. It does not give him or the creditor any status earlier than bankruptcy.

The trustee in bankruptcy is not an innocent purchaser for value. He takes title to the bankrupt's property subject to all liens, claims and equities existing thereon. *Zortman, Trustee* v. *First National Bank,* 216 U. S. 134 (1910); *Commercial Credit Co.* v. *Davidson,* 112 F. 2d 54 (C. A. 5, 1940); *Hoehn* v. *McIntosh,* 110 F. 2d 199 (C. A. 6, 1940); *Hertzberg, Trustee* v. *Associates Discount Corp.,* ..... F. 2d ..... (C. A. 6, 1959). In fact the trustee, standing in the position of a creditor, holds about the lowest form of security.

Whether or not a valid lien on the bankrupt's property existed is dependent upon the recording laws of the state. *Holt* v. *Crucible Steel Co.,* 224 U. S. 262 (1912).

As heretofore pointed out, the chattel mortgage of the bank was valid under Michigan law. No creditor could [fol. 17] have assailed it prior to bankruptcy. The mortgage was based upon a present consideration. It was filed for record within a reasonable time after its execution. The bankrupt received full value. We see no good reason in this case for extending back retroactively the "strong arm" of the trustee to a period of five months before bankruptcy and invalidating a security valid under state law. The creditors of the bankrupt's estate are entitled to no such windfall.

The confusion and criticism which followed in the wake of *Constance* v. *Harvey* are not conducive to our following the decision.[3]

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[3] 4 Collier on Bankruptcy, 14th Edition, p. 1431 fn. 30.

The National Bankruptcy Conference in 1956 approved an amendment to Section 70e to overrule the doctrine of Constance v. Harvey. Summary of Proceedings N. B. C., November 9, 10, 1956, p. 9.

In House Report 745, Committee on Judiciary H. R. 7242, August 3, 1959, it is stated: "From 1910 to 1954 it was assumed that the

District Judge Picard was right in holding that the chattel mortgage was valid under Michigan law and his judgment is affirmed.

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rights of the trustee under 70c accrue as of the date of bankruptcy and no earlier. However, in Constance v. Harvey (215 F. 2d 575 (2d Cir., 1954), cert. denied, 346 U. S. 913 (1955), it was held that under Section 70c a trustee has the rights of an ideal hypothetical creditor who has acquired his claim prior to bankruptcy. . . .

The rights of a trustee under 70e are entirely derivative and dependent upon the existence of an actual creditor against whom the transfer might have been invalidated in the absence of bankruptcy. Those rights relate back to whatever date they first arose. Section 70c, on the other hand, gives the trustee the status of a hypothetical judicial lien creditor whose rights arise as of the date of bankruptcy.

" . . . The holding in Constance v. Harvey by injecting into Section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of Constance v. Harvey. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect transfers. The doctrine of Constance v. Harvey presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the Act. . . . "

Two District Courts have refused to follow Constance v. Harvey.

In re American Textile Printers Co., 152 F. Supp. 901 (D. C. N. J., 1957).

In re Billings, 170 F. Supp. 253 (D. C. Mo. 1959).

[fol. 18]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—March 7, 1960

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 19] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 20]

SUPREME COURT OF THE UNITED STATES

No. 949, October Term, 1959

WM. G. LEWIS, Trustee, Petitioner,

vs.

MANUFACTURERS NATIONAL BANK OF DETROIT.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~949~~ 94

WM. G. LEWIS, Trustee,
Petitioner,

vs.

MANUFACTURERS NATIONAL BANK
OF DETROIT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1959

No.....

WM. G. LEWIS, Trustee,
Petitioner,

vs.

MANUFACTURERS NATIONAL BANK
OF DETROIT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of The United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit, dated and entered in the above cause on March 7, 1960.

(A) OPINIONS BELOW

The following opinions rendered in the within cause are attached as Appendix A:

1. *In re Todor A. Alikasovich, d/b/a Miami Cleaners & Tailors* (6 Cir., 1960) 275 F. 2d 454.
2. Same case (D. C. E. D. Mich., 1959). No reported opinion.

(B) JURISDICTION

Jurisdiction is conferred on this Court by Section 24c of the Bankruptcy Act, 11 USC Sec. 47c; and by 28 USC, Sec. 1254.

(C) QUESTION PRESENTED FOR REVIEW

The following question is presented for review:

Is a belatedly recorded chattel mortgage void as against a Trustee in Bankruptcy under Section 70c of the Bankruptcy Act without proof of the existence of an actual creditor who could void the mortgage, when state law provides that such mortgage is void as against a simple contract creditor who extends credit in the interim between the execution and the recording of the mortgage?

(D) STATUTES INVOLVED

1. The Constitution of the United States, Art. I, Sec. 8, cl. 4:

> "The Congress shall have Power * * * To establish * * * uniform laws on the subject of Bankruptcies throughout the United States."

2. Bankruptcy Act, Sec. 70(c); 11 USC Sec. 110(c):

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

3. Bankruptcy Act, Sec. 70(e); 11 USC Sec. 110(e):

> "(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law is applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.
>
> "(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate

and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

"(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

4. Michigan Compiled Laws 1948, Section 566.140, as amended by Public Acts of 1957, Act 233; MSA Sec. 26.-929:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides, except when the mortgagor is a non-resident of the state, when the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county in which the property is located: *Provided that no purchase money mortgage shall be void as against the credi-*

tors of the mortgagor if filed within 14 days from the date of the execution of such mortgage."[1]

(E) STATEMENT OF THE CASE

This case involves the validity of a chattel mortgage on an automobile as against the claims of the trustee in bankruptcy of the mortgagor.

Prior to bankruptcy, the bankrupt had borrowed money from Manufacturers National Bank of Detroit, Michigan. To evidence the loan and secure its payment, on November 4, 1957 he executed and delivered to the bank a promissory note and chattel mortgage on his 1953 Pontiac automobile. The chattel mortgage was filed by the bank with the Wayne County Register of Deeds on November 8, 1957. There was no evidence that any creditor had extended credit between November 4 and November 8, 1957.

About five months later, namely, April 18, 1958 the borrower filed a voluntary petition in bankruptcy in the District Court upon which an adjudication in Bankruptcy was duly entered.

The mortgage in question was admittedly not a purchase money mortgage, and the 14 day grace period allowed by Act 233 of 1957 did not apply. Since the mortgage was not recorded immediately, the Referee in Bankruptcy held that it was void as against the Trustee in Bankruptcy under

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[1] The last proviso was added by Act 233 of 1957 and replaced the proviso which had been added by Act 153 of 1956. See *Hertzberg v. Associates Discount Corporation* (6 Cir., 1959) 272 F. 2d 6; Cert. den. April 18, 1960. Act 233, in turn, has been replaced by Public Acts of 1959 No. 110 which provides that *any* mortgage is valid as against creditors if recorded within 10 days after its execution. This amendment has no effect on the problem presented herein. Under the 1959 Act, the problem presented by this case will still occur if the mortgage is recorded more than 10 days after its execution.

Sec. 70c of the Bankruptcy Act as interpreted by *Constance v. Harvey* (2 Cir., 1954), 215 F. 2d 571.

Under that decision, the Trustee, by virtue of Sec. 70c of the Bankruptcy Act, is given the rights of a hypothetical creditor who extended credit in the interim between the execution and the recording of the mortgage and who, on the date of bankruptcy, obtained a lien on the property of the bankrupt.

The District Court reversed, and the judgment of the District Court was affirmed by the Court of Appeals for the 6th Circuit on March 7, 1960.

REASONS FOR GRANTING THE WRIT

1. There is a conflict between two Courts of Appeal on this issue.

The Court of Appeals for the 2d Circuit decided *Constance v. Harvey, supra,* in 1954. In that decision it was held that where state law provided that a belatedly recorded chattel mortgage was void as against a simple interim contract creditor of the bankrupt, a trustee in bankruptcy, under Section 70c of the Bankruptcy Act, is vested with the rights of such a creditor, whether or not one actually exists. This Court denied certiorari in 1955, 348 U. S. 913. The 2d Circuit repeated its decision in *Conti v. Volper* (2 Cir., 1956), 229 F. 2d 317. The 6th Circuit, in the instant case, reached a contrary result.

It is true that there is a difference between New York law and Michigan law with reference to the recording of chattel mortgages. New York law requires that the mortgage be recorded within a reasonable time. Michigan law requires that it be recorded immediately. In both states, however, the failure to record within the proper time means

that the mortgage is void as to a simple contract creditor who extends credit in the interim between execution and recording. Since *Constance v. Harvey, supra;* held that, under 70c of the Bankruptcy Act, a trustee *is* such a creditor, and the decision by the Court of Appeals in the instant case held that, under 70c of the Bankruptcy Act, a trustee *is not* such a creditor, the decisions of the 2d Circuit and the 6th Circuit are in direct conflict. Further, 70c of the Bankruptcy Act is not being uniformly applied, contrary to Constitution, Art. I, §8, cl. 4.

2. Importance of the issue.

The issue in this case is a matter of extreme importance in commercial financing throughout the United States.

Every state requires the recording of a chattel mortgage in order to insure the mortgagee's rights as against other creditors of the mortgagor. The formalities of recording, the time of recording, and the place of recording vary from state to state. In addition, the states are not in agreement as to which creditors of the mortgagor are benefited by the mortgagee's failure to comply with the recording acts.

Each state has a time within which the mortgage must be recorded so as to protect the mortgagee. In some states, as Michigan (before 1960), the mortgage must be recorded immediately. In other states, as New Jersey and Illinois (and now Michigan), the mortgagee has a specified period of time within which he may record. In still other states, as New York, the mortgagee has a reasonable time to record. If the mortgagee fails to record within the time allowed by law, then the mortgage will be void as to certain types of creditors. Again, the states vary as to which creditors are benefited. In some states any creditor may void the mortgage. In other states creditors who became such prior to the recording may void the mortgage. In Michigan only a creditor who became such in the interim

between execution and recording may void the mortgage. In still other states only a creditor who fastens a lien on the property between the date of execution and the date of recording can void the mortgage. The confusion presented by these various state laws is compounded by the fact that there is only one Bankruptcy Act and that the Bankruptcy Act must operate uniformly in all states.

The rights of creditors in a situation where a chattel mortgage has been belatedly recorded may be split into two main groups. In one group of states, and under the proposed Uniform Commercial Code, only creditors who obtain a lien between the execution and the recording of the mortgage can void the mortgage. In these states, the rule of *Constance v. Harvey* has no application whatsoever. Application of *Constance v. Harvey* is restricted to those states where any simple contract creditor who extends credit in the interim between the execution and the recording of a belatedly recorded mortgage can thereafter void the mortgage.

We have not made an analysis of all states where *Constance v. Harvey* applies. However, it does apply in New York, California and Illinois, as well as Michigan.[2] And these are extremely important commercial states.

As stated by the Court of Appeals (*infra*, p. 24), *Constance v. Harvey* was followed by "confusion and criti-

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[2] For New York law, see *Constance v. Harvey, supra;* and *Karst v. Gane* (1893), 136 N. Y. 316, 323; 32 N. E. 1073.

For California law, see *Miller v. Sulmeyer* (9 Cir., 1959), 263 F. 2d 513, cert. den. 4 L. Ed. 2d 78; and *Wolpert v. Gripton* (1931), 213 Cal. 474, 481, 2 P. 2d 767.

For Illinois law, see *Collateral Finance Co. v. Brand* (Ill. App., 1938), 298 Ill. App. 130, 18 N. E. 2d 392.

For Michigan law, see *Ransom & Randolph v. Moore* (1935), 272 Mich. 31.

cism".[3] Although the Court's decision satisfied the "criticism", it did not eliminate the "confusion". Rather, the confusion has been increased by the decision herein.

In order to determine the validity of chattel mortgage transactions in many states, including several of our most important commercial states, a final ruling by this Court is urgently needed.

CONCLUSION

Petitioner prays that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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[3] See 4 *Collier on Bankruptcy*, 1429-34, Sec. 70.51(2), and articles cited therein at note 30, for a critical view of *Constance v. Harvey*.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
IN BANKRUPTCY

In the Matter of: Todor E. Alikasovich, d.b.a. Miami Cleaners & Tailors, Bankrupt.	No. 40542

OPINION OF HON. FRANK A. PICARD, DISTRICT JUDGE

STATEMENT OF FACTS

Mortgagee petitions review of Bankruptcy Referee's order holding chattel mortgage void. The facts are these:

On November 4, 1957, bankrupt executed and delivered to respondent, Manufacturer's National Bank, a note and chattel mortgage covering a 1953 Pontiac automobile owned by him. Disbursement was made thereon November 5, 1957, but the mortgage was not recorded until November 8, 1957, or four days after its execution. The bankrupt filed his petition April 18, 1958. The receiver contended inter alia that failure to record the chattel mortgage immediately rendered the same void as against him. Referee's determination of invalidity was founded on two conclusions:

1. That M.S.A. 26.929 "allows" 14 days within which to record purchase money mortgages, but fails to

mention a permissive time in other cases, hence non-purchase-money mortgages are void unless filed "immediately".

2. That under Michigan law a creditor could have intervened the time the mortgage was off-record, that his rights would not be defeated by subsequent recording, and that under Sec. 70 (c) the trustee stands in his stead whether or not such creditor exists.

CONCLUSIONS OF LAW

First: This is admittedly not a purchase money mortgage.

Second: The Michigan Statute reads:

M.S.A. §26.929

> "Every mortgage • • • of goods and chattels • • • which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession • • • *shall be absolutely void* as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, *unless* the mortgage or a true copy thereof *shall be filed* in the office of the register of deeds • • • Provided, however, *That no purchase money mortgage shall be void as against the creditors* of the mortgagor *if* filed within 14 days from the date of the execution of such mortgage." (Emphasis ours.)

Similarly §26.922 provides conditions under which agreements shall be void unless they be in writing. But, as this language does not operate to void written contracts because they previously were oral, it does not void recorded documents because they previously were unrecorded.

The courts have held that:

> "* * * the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage." Detroit Trust Co. v. Pontiac Savings Bank, 196 F. 29, p. 33.

See also Peter Schuttler Co. v. Gunther, 222 Mich. 430, 192 N. W. 661; Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 247 N. W. 76, and cases cited therein. General Motors Acceptance Corporation v. Coller, 106 F. 2d 584, relied on by the referee, conforms to this result.

Since no creditors, mortgagees or purchasers intervened November 4 and 8, 1957, and since no prior creditors perfected liens during that time, the mortgage was not void under state law.

The chief question is what rights are acquired by the trustee under §70 (c). Had creditors intervened, they could have avoided the mortgage as disclosed above, and the trustee would be placed in their position to effectuate this object. Deane v. Fidelity Corporation of Michigan, 82 F. Supp. 710; In Re Cotter, 113 F. Supp. 859. Also, if the lien were unrecorded as of the date of filing petition in bankruptcy, the mortgage would be voided. In re Urban, 136 F. 296. To otherwise void the mortgage under the Michigan Statutes, the trustee must either be placed in the status of a non-existing intervening creditor, or the status of a creditor at the time the mortgage was off-record. Bankruptcy Act §70 (c) puts him in neither position. It provides:

> "The trustee, as to all property, (of the bankrupt at the date of bankruptcy) whether or not coming into possession or control of the court, upon which a *creditor of the bankrupt could have ob-*

> *tained a lien* by legal or equitable proceedings *at the date of bankruptcy*, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by * * * such proceedings, whether or not such a creditor exists." (Emphasis ours.)

Patently the position of a creditor with a right to perfect a lien while the mortgage was off-record is precluded because the trustee indisputably is vested as of the *date of bankruptcy*, with rights to property upon which a creditor could have obtained a lien *at that date* only.

Trustee argues that he is placed in the position of an intervening creditor, whether or not such exists, and who has perfected a lien, whether he has done so or not. Let us follow the history of this section. The former, 1950, amendment read:

> "* * * The trustee, as to *all* property * * * shall be deemed vested as of the date of bankruptcy with all the rights, * * * of a creditor then holding a lien thereon * * * whether or not such a creditor actually exists." (Emphasis ours.)

Particularly with the understanding of the former impediment that confronted trustees, (See Security Warehousing Co. v. Hand, 206 U. S. 415) we fail to see how this can be read as doing more than vesting trustee with lien rights whether or not there exists a creditor—"then holding a lien." It does not put him in that position "whether or not a creditor could obtain a lien."

But the 1952 amendment removes all doubt, vesting him with rights to property only—

> "upon which a creditor of the bankrupt could have obtained a lien * * *."

And to reach the contended construction we would have to read this qualification entirely out of the section, for to say trustee is vested as to property—

> "upon which a creditor of the bankrupt could have obtained a lien, whether he could obtain a lien or not"

is contradictory and renders the qualification impotent. The legislative intent appears to have been to leave property to which trustee is vested with title under §70 (a) subject to attack under §70 (e), wherein the test of voidability is voidability under the appropriate State or Federal law; and to apply §70 (e) solely to property not covered thereby. House Report No. 2320 on S. 2234, 82nd Congress, 2nd Sess. (1952) 2, explains the amendment—

> "* * * trustee already has title to all the bankrupt's property, and *it is not proper to say that he has rights of a lien creditor upon his own property.* What should be said is that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner." (Emphasis ours.)

Constance v. Harvey, 215 F. 2d 571 (CA-2), followed in Conti v. Volper, 229 F. 2d 317 (also reported as In Re Gondola Associates, 132 F. Supp. 205) is the strongest case cited and is urged as the primary authority for substantiating trustee's position. There the mortgage was unrecorded almost a year and was found not to be recorded "within a reasonable time" as required by New York law. Originally the Circuit Court remanded the case to determine whether the mortgage was recorded prior to the filing of bankruptcy petition and prior to intervention of creditors. A month later, sua sponte, the court reversed its result with the following language:

> "*Since an existing creditor* * * * could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under §70, sub. c of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor * * * we think his position must prevail * * *."

It is not clear whether the court meant, as a finding of fact, that under New York law a creditor did exist who could have obtained a lien, and since he existed, the trustee was in his shoes; or whether the court meant, as a matter of law, that since such a creditor could exist, the trustee was in his shoes. In Conti v. Volper, supra, it was interpreted as making the legal, not factual, conclusion and applied to a situation where no creditors did exist.

See also In Re Billings, 170 F. Supp. 253 for a like construction. If the Constance case is based upon an interpretation of New York law, which we believe it is, it is entirely inapplicable here, the question of whether the mortgage is filed within a "reasonable time" being immaterial under the Michigan Statute. See In Re Varratos, 159 F. Supp. 730. (D. C. N. Y.) affirmed 259 F. 2d 920 (CA-2), and In Re American Textile Printers Co., 152 F. Supp. 901.

At best the Constance case is the ambiguous statement of another Circuit which we are constrained not to follow in view of the present clear wording of the Act itself to the contrary effect, the legislative intent as expressed in the House Report, supra, and to the utter lack of evidence of legislative intent to create the broad inequities that would commonly follow its application.

This court is aware that Bankruptcy Act Section 70 (c) has been of great help in the past, under a rather strict interpretation, in achieving equity and justice in bankruptcy cases. However, a close analysis of those cases will

reveal that it has usually not been utilized except where the possibility or probability of fraud was present.

Furthermore, if such a strict interpretation is followed, as made by the Bankruptcy Court, it will mean the end of a very salient and important feature of our economics—banking and otherwise. Four days is certainly not an unreasonable time to pass between the giving of a mortgage and its recording and surely no court can take that position. In Brown, Trustee v. Atlantic Bank of New York, 259 F. 2d 920, the mortgage filed seven days after being given was not unreasonable unless so found by the court. If this is important, we hold to the contrary. Here we find four days not unreasonable. And, if so, where is the limit and what about the duty of the loaner who is handling other people's money to check up on investments made with that money? Here a long time elapsed between the giving of the mortgage and the day bankrupt's petition was filed. But only four days between the giving and filing of the mortgage. Congress never intended an interpretation that would handicap business and certainly not one which would seek to give an advantage to creditors such as would happen here if the trustee were to be in the position at all times of a hypothetical creditor who does not and never did exist. Would not this be "unjust enrichment" for the other creditors? We doubt very much that any interpretation such as advocated by the trustee can meet the test of constitutionality that might be suggested here, as long as it is legal to take a mortgage for money loaned. This is legal in Michigan. In fact we don't know of any place in the world where it isn't legal. Being legal, we should not give a strained interpretation of the Bankruptcy Act to deprive the loaner not only of the fruits of his loan but of the very loan itself.

For these reasons we hold that the mortgage herein is valid and this matter is hereby remanded to the Referee for further proceedings in conformity herewith. An order to that effect should be presented for the court's signature.

Frank A. Picard,
United States District Judge.

Dated: July 27, 1959.

No. 14,019

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

In the Matter of:
TODOR R. ALIKASOVICH, d/b/a
MIAMI CLEANERS & TAILORS,
Bankrupt.
WM. G. LEWIS, Trustee in
Bankruptcy,
Appellant,
v.
MANUFACTURERS NATIONAL BANK OF
DETROIT, a National Banking
Association,
Appellee.

APPEAL from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

Decided March 7, 1960

Before: Cecil, Pope and Weick, Circuit Judges.

Weick, Circuit Judge. This case involves the validity of a chattel mortgage on an automobile as against the claims of the trustee in bankruptcy of the mortgagor.

Prior to bankruptcy, the bankrupt had borrowed money from Manufacturers National Bank of Detroit, Michigan.

To evidence the loan and secure its payment on November 4, 1957 he executed and delivered to the bank a promissory note and chattel mortgage on his 1953 Pontiac automobile. The proceeds of the loan were disbursed on the following day. The papers were then forwarded from the bank's branch office, where the loan had been made, to its downtown office for processing and recording of the mortgage. The chattel mortgage was filed by the bank with the Wayne County Register of Deeds on November 8, 1957.

About five months later, namely, April 18, 1958 the borrower filed a voluntary petition in bankruptcy in the District Court upon which an adjudication in Bankruptcy was duly entered.

The referee in bankruptcy held that the mortgage was void as against the trustee in bankruptcy. The District Judge reversed the order of the referee and the trustee in bankruptcy has appealed to this court.

The pertinent provision of Michigan Statutes Annotated, 26.929, as amended by Public Act 233, September 27, 1957 relating to the recording of chattel mortgages is as follows:

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides. . . . Provided,

however, that no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage. . . ."

The last proviso in the statute is the amendment of September 27, 1957. Obviously, it has no application to the present case since the chattel mortgage was not a purchase money mortgage.

The Michigan statute has been construed to require the chattel morgage to be filed immediately with the Register of Deeds. *General Motors Acceptance Corp. v. Coller,* 106 F. 2d 584 (C. A. 6, 1939). Unless so filed, the chattel mortgage is void as against creditors who extended credit in the interim between the date of the instrument and its filing for record. *Trailmobile, Inc. v. Wiseman, Trustee,* 244 F. 2d 76 (C. A. 6, 1957); *Klingensmith v. James B. Clow & Sons,* 270 Mich. 460 (1935); *Ransom & Randolph Co. v. Moore,* 272 Mich. 31 (1935); *Burroughs Adding Machine Co. v. Wieselberg,* 230 Mich. 15 (1925); *O'Neil v. Brooks,* 180 Mich. 540 (1914); *Fearey v. Cummings,* 41 Mich. 376 (1879); Cf. *Moore v. Bay,* 284 U. S. (1931).

There was no evidence that any creditor had extended credit to the bankrupt between the date of the mortgage and its recording four days later. Since no creditors had intervened in the present case, the chattel mortgage of the bank was valid and unassailable under Michigan law. If any imperfection had existed in the mortgage it had become perfected long before bankruptcy.

The trustee in bankruptcy contends that although unassailable under state law, the chattel mortgage was void by reason of the provisions of Section 70 subsection (c) of

the Bankruptcy Act[1] which gave to the trustee the status of a perfect hypothetical creditor and, therefore, the case must be considered as if a creditor did exist in the interim period.

The trustee relies on *Constance v. Harvey*, 215 F. 2d 571. (C. A. 2, 1954), cert: denied 348 U. S. 913, which involved the validity of a chattel mortgage under New York law. As judicially construed, the New York statute granted a reasonable time to file the mortgage after its execution. In that case over 10 months had elapsed between the date of the mortgage and its filing for record which the court said was not within a reasonable time. No creditor, however had intervened in the interim. The court held the mortgage void under Section 70, subsection (c) of the Bankruptcy Act.[2] The court said:

> "Since an existing creditor without notice of the chattel mortgage could have obtained a lien at the time of the filing of the petition in bankruptcy, and since Section 70, subsection (c) of the Bankruptcy Act the trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—Hoffman v. Cream-O-Products, 180 F. 2d 649 (C. A. 2, 1950), cert. denied 340 U. S. 815 (1950) we think his position must prevail over that of the mortgagee-appellant."

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[1] "The Trustee, as to all property, whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor exists" (11 U. S. C. A. ¶110c).

[2] The court originally held the mortgage to be valid. On petition for rehearing, the court, sua sponte, reversed its original position and held the mortgage void under ¶70c.

The trouble with *Constance v. Harvey,* in our judgment, was in the retroactive extension of the rights of the trustee in bankruptcy to include those of a creditor which did not in fact exist as of a period almost one year prior to bankruptcy. The critical time for the accrual of the trustee's rights under Section 70c is "at the date of bankruptcy" not prior thereto. The trustee can only be "vested as of such date" with the rights of a creditor "then holding a lien whether or not such a creditor actually exists." This means a creditor at that time and not prior thereto. Before *Constance v. Harvey,* it had always been understood that the trustee's rights under Section 70c accrued as of the date of bankruptcy and not earlier. There is nothing in the section giving to either the trustee or a creditor rights antecedent to bankruptcy.

The rights and remedies of the trustee under Section 70, subsection (e) of the Bankruptcy Act to reach fraudulent or otherwise invalid transfers or encumbrances must not be confused with his rights under Section 70, subsection (c). While Section 70, subsection (e) would permit a trustee to reach invalid transfers or encumbrances whenever they arose, it would afford no remedy here where the lien of the chattel mortgage had been perfected and was valid against creditors long before bankruptcy.

Section 70, subsection (c) gives the trustee the status of a lien creditor as of the date of bankruptcy regardless of whether or not such a creditor existed. It does not give him or the creditor any status earlier than bankruptcy.

The trustee in bankruptcy is not an innocent purchaser for value. He takes title to the bankrupt's property subject to all liens, claims and equities existing thereon. *Zortman, Trustee v. First National Bank* 216 U. S. 134 (1910); *Commercial Credit Co. v. Davidson,* 112 F. 2d 54

(C. A. 5, 1940); *Hoehn v. McIntosh*, 110 F. 2d 199 (C. A. 6, 1940); *Hertzberg, Trustee v. Associates Discount Corp.*, . . . F. 2d . . . (C. A. 6, 1959). In fact the trustee, standing in the position of a creditor, holds about the lowest form of security.

Whether or not a valid lien on the bankrupt's property existed is dependent upon the recording laws of the state. *Holt v. Crucible Steel Co.*, 224 U. S. 262 (1912).

As heretofore pointed out, the chattel mortgage of the bank was valid under Michigan law. No creditor could have assailed it prior to bankruptcy. The mortgage was based upon a present consideration. It was filed for record within a reasonable time after its execution. The bankrupt recieved full value. We see no good reason in this case for extending back retroactively the "strong arm" of the trustee to a period of five months before bankruptcy and invalidating a security valid under state law. The creditors of the bankrupt's estate are entitled to no such windfall.

The confusion and criticism which followed in the wake of *Constance v. Harvey* are not conducive to our following the decision.[3]

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[3] 4 Collier on Bankruptcy, 14th Edition, p. 1431 fn. 30.

The National Bankruptcy Conference in 1956 approved an amendment to Section 70c to overrule the doctrine of Constance v. Harvey. Summary of Proceedings N. B. C., November 9, 10, 1956, p. 9.

In House Report 745, Committee on Judiciary H. R. 7242, August 3, 1959, it is stated: "From 1910 to 1954 it was assumed that the rights of the trustee under 70c accrue as of the date of bankruptcy and no earlier. However, in Constance v. Harvey (215 F. 2d 575 (2d Cir., 1954), cert. denied 346 U. S. 913 (1955)), it was held that under Section 70c a trustee has the rights of an ideal hypothetical creditor who has acquired his claim prior to bankruptcy. . . .

(Continued on next page)

District Judge Picard was right in holding that the chattel morgage was valid under Michigan law and his judgment is affirmed.

(Continued from preceding page)

The rights of a trustee under 70e are entirely derivative and dependent upon the existence of an actual creditor against whom the transfer might have been invalidated in the absence of bankruptcy. Those rights relate back to whatever date they first arose. Section 70c, on the other hand, gives the trustee the status of a hypothetical judicial lien creditor whose rights arise as of the date of bankruptcy.

". . . The holding in Constance v. Harvey by injecting into Section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of Constance v. Harvey. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect transfers. The doctrine of Constance v. Harvey presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the Act. . . ."

Two District Courts have refused to follow Constance v. Harvey.

In re American Textile Printers Co., 152 F. Supp. 901 (D. C. N. J., 1957).

In re Billings, 170 F. Supp. 253 (D. C. Mo., 1959).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~949~~ 14

WM. G. LEWIS, Trustee,
Petitioner,
vs.
MANUFACTURERS NATIONAL BANK
OF DETROIT,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on March 7, 1960, be denied.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent contends that the statement of question presented for review as set forth in the Petition on page 2 is insufficient and that the precise legal question considered by the Sixth Circuit Court of Appeals may be more properly stated as follows:

> DOES SECTION 70c OF THE BANKRUPTCY ACT INVEST THE TRUSTEE WITH THE STATUS OF A FICTIONAL CREDITOR EXTENDING CREDIT AT ANY ADVANTAGEOUS TIME DURING AN UNLIMITED PERIOD PRIOR TO DATE OF BANKRUPTCY WITH THE RESULT THAT THE TRUSTEE CAN AVOID A MICHIGAN CHATTEL MORTGAGE FILED OVER FIVE (5) MONTHS PRIOR TO DATE OF BANKRUPTCY WHEN MICHIGAN LAW (NOW NO LONGER IN EFFECT) MADE SUCH MORTGAGE VOID AS AGAINST A SIMPLE CONTRACT CREDITOR EXTENDING CREDIT BETWEEN DATE OF EXECUTION AND DATE OF RECORDING THE MORTGAGE?

REASONS FOR DENYING THE WRIT

Petitioner invokes this Court's discretion by asserting a serious conflict between appellate courts on a question of national importance. Respondent will demonstrate that no serious conflict and no problem of national importance here exist.

The asserted conflict results from the Sixth Circuit's rejection in the instant case (hereinafter called *Lewis*) of a theory advanced in 1954 by the Second Circuit Court of Appeals in *Constance v. Harvey*[1] (hereinafter called *Con-*

[1] (2nd Cir., 1954) 215 F. 2d 571, cert. den. 348 U. S. 913, 75 S. Ct. 294.

stance). The *Constance* theory has generated nothing but criticism and rejection within the Second Circuit and elsewhere. The opinion in *Constance* and the subsequent critical treatment thereof clearly show that the theory was not fully considered and, if it still retains any vitality, it is as a localized, unfortunate deviation from the Congressional intent. Indeed, even Petitioner does not indicate any substantial disagreement with the Sixth Circuit's rejection of the *Constance* theory.

The question presented, far from having national dimensions and recurrent interest, has only a limited geographical basis and may be expected to arise only occasionally in unusual factual situations involving a lack of diligence by the secured lender.

In short, the question submitted may have great interest for the Petitioner and may have some lingering place in scholarly works on the Bankruptcy Act, but does not warrant this Court's attention in view of the press of more serious business. *Rice v. Sioux City Memorial Park Cemetery* (1955), 349 U. S. 70, 75 S. Ct. 614.

I. The Nature of the Conflict

The Sixth Circuit's holding in *Lewis* that a trustee's status under Section 70c accrues *for all purposes* at the date of bankruptcy is hardly novel doctrine, for it merely represents an application of the general principle unanimously announced by this Court in *Bailey v. Baker Ice Machine Company*, 239 U. S. 268, 275-76, 36 S. Ct. 50, 54 (1915), where the Court stated with reference to the statutory predecessor of Section 70c:

> "Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated,

> and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? *When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed.* It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. • • • Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in §47a as amended. As this was not done, *we think the better view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed.* Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the state." (Emphasis supplied.)

This decision, of course, construed Section 47(a) of the Bankruptcy Act as it stood after the 1910 amendment, but the subsequent history resulting in the present language of Section 70c is a chronicle of Congressional confirmation of this Court's opinion in *Bailey*, as demonstrated in the comment on the genesis of present Section 70c annexed hereto as an Appendix.

The conflict which concerns Petitioner arises from the Sixth Circuit's rejection of a theory expressed in *Constance*. In that case, the Court held that Section 70c permitted a trustee to set aside a mortgage properly of record for over one year prior to bankruptcy because such mortgage

had not been filed within a reasonable time after execution as required by New York law and, therefore, would have been vulnerable to attack by a creditor who extended credit between the date the mortgage was executed and the date it was recorded. No such creditor existed at date of bankruptcy, but the Court stated that Section 70c permitted the trustee to avoid the mortgage as a *fictional creditor* extending credit at a time over a year prior to bankruptcy.

Nowhere in its opinion does the Second Circuit Court of Appeals consider the statutory history of Section 70c or available expressions of Congressional intent. Nowhere does that Court display any awareness that its construction of Section 70c creates disharmonies in the Bankruptcy Act. Apparently, the decision was reached only by a literal construction of the language of 70c (as amended in 1952). The only case precedent cited by the Court, *Hoffman v. Cream-O-Products,* 180 F. 2d 649, cert. den., 340 U. S. 815, 71 S. Ct. 44, is completely irrelevant since the security interest there under review was never properly recorded and the trustee clearly had status at date of bankruptcy to set it aside.

Subsequently, in *Conti v. Volper,* 229 F. 2d 317, the Second Circuit reiterated the *Constance* theory in a decision, the full text of which follows:

> "*Constance v. Harvey,* 2 Cir., 1954, 215 F. 2d 571, reluctantly followed by Judge Byers, *may seem to reach an inequitable result,* but Section 70, sub. c, of the Bankruptcy Act, 11 U. S. C. A. §110, sub. c, provides: 'The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such

proceedings, whether or not such a creditor actually exists'; and it is difficult to see how such *plain language* could be disregarded.

Affirmed." (Emphasis supplied.)

It is noteworthy that the Court recognized that its theory produces inequitable results, but apparently again felt bound by the "plain language" of Section 70c.

Other courts considering the "plain language" of Section 70c have found its meaning plainly contrary to this Second Circuit theory. In addition to the Sixth Circuit decision in *Lewis*, a District Court of the Eighth Circuit has rejected *Constance*,[2] the Fifth Circuit Court of Appeals has indicated a similar disposition[3] and even in the Second Circuit, at least one District Court has found it possible to evade the *Constance* doctrine by regarding that decision as merely an application of New York law rather than a controlling pronouncement as to the meaning of Section 70c.[4]

In short, the competing interpretation of Section 70c advanced by the Second Circuit has been confined to the Second Circuit and the severe criticism which *Constance* generated makes it highly doubtful that the decision will be accepted elsewhere.[5]

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[2] *In Re Billings* (W. D. Mo., 1959) 170 F. Supp. 253.

[3] *Blackford v. Commercial Credit Corporation*, (5th Cir., 1959) 263 F. 2d 97, Note 14 at pages 111 and 112.

[4] *In Re American Textile Printers Co.*, (D. C. N. J., 1957) 152 F. Supp. 901.

[5] The considerable critical literature is collected in a comment in 57 Michigan Law Review, 1227 (June, 1959); see also the criticism by the House Judiciary Committee in House Report 745 on H. R. 7242, 86th Congress, First Session (1959) where the *Constance* theory is branded as "statutorily unwarranted".

Apart from the evident failure of the "plain language" to support the *Constance* theory; and the fact that no evidence of Congressional intent lends credence thereto, the real anomalies created in the Bankruptcy Act by such theory underscore its insubstantiality.

The *Constance* theory renders Section 70e mere surplusage. Further, and perhaps more important, it runs counter to Congressional recognition that there must be some repose in transactions prior to bankruptcy. Even a transfer in fraud of creditors is unassailable after one year;[6] even a preference is unassailable after four months;[7] but the *Constance* theory would permit the trustee to rummage an unlimited period prior to bankruptcy in search of advantage as a fictional lender. Placed in the context of the Bankruptcy Act and Congressional policy, the *Constance* theory is revealed as no more than an incongruity.

II. The Conflict has neither National Importance nor General Commercial Importance

Petitioner states that the question submitted involves the "extremely important commercial states" of Michigan, New York, Illinois and California. These states may be commercially important, but Petitioner has lost sight of the distinction between a problem which *can* arise in a major commercial state and a problem of recurrent concern in the commerce of such state.

The decision in *Lewis* has put an end to what might have been a serious problem in Michigan prior to 1960. The Michigan legislature, by Public Act 110 of 1959,[8] effective

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[6] Section 67(d), Bankruptcy Act, 11 U. S. C. A. Section 107(d).

[7] Section 60, Bankruptcy Act, 11 U. S. C. A. Section 96.

[8] Mich. Stat. Ann., Section 26.929 (1959 Cum. Supp.).

March 19, 1960, has created a ~~20~~ 10 day grace period for filing chattel mortgages. Accordingly, a reasonably diligent mortgagee can now obtain a valid chattel mortgage lien which is insulated even against the rejected *Constance* theory.

Even in New York the *Constance* theory creates a problem only where a mortgage is not filed within a reasonable time after its execution and thus diligent mortgagees in New York preclude the impact of the *Constance* mischief.

In Illinois, there is a specific statutory grace period of 20 days for filing chattel mortgages[9] and, accordingly, not even great diligence is necessary there to immunize the mortgage from the *Constance* theory.

California law does not require instantaneous recording of the chattel mortgage, but does require recording as soon as practicable. The only Federal case cited by Petitioner involving California law[10] dealt with a 79-day delay between execution and recording and the holding therein may be more properly read as an application of Section 70e of the Bankruptcy Act where actual interim creditors existed rather than an application of Section 70c. The *Constance* theory would become of interest in California only if such questionable doctrine is subsequently espoused by the federal courts in the Ninth Circuit. With the *Lewis* precedent established, and in view of the inherent defects in the *Constance* theory, it would seem that federal courts applying California law would hardly be troubled by the existence of *Constance*, a case without statutory pedigree or judicial precedent.

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[9] Ill. Anno. Stat., Chap. 95, Section 4 (1959 Ann. Cum. Pocket Part).

[10] *Miller v. Sulmeyer*, (9th Cir., 1959) 263 F. 2d 513, *cert. den.* 361 U. S. 838, 80 S. Ct. 55.

CONCLUSION

For the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: June 13, 1960.

APPENDIX

HISTORICAL DEVELOPMENT OF SECTION 70(c)

Congress in the 1910 amendment to the Bankruptcy Act vested the trustee with all of the lien rights which any creditor could have acquired under state law as of the date of bankruptcy. The language of Section 47(a)(2) (considered by this Court in *Bailey v. Baker Ice Machine Company*, 239 U. S. 268, 36 S. Ct. 50, 1915) was as follows:

> "Trustees shall respectively: * * * (2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. * * *"

The Chandler Act of 1938 retained the substance of amended Section 47a(2) with some minor changes in phraseology, but shifted the section to become Section 70(c). The 1938 version of Section 70(c), leaving out the first sentence which is not pertinent, read:

> "* * * The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies,

and powersof a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor acually exists; and, as to all other property, the trusteeshall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

That is the way this section stood until the 1950 amendment. The 1950 version of Section 70(c), again leaving out the first sentence which is not applicable, read:

"* * * The trustee, as to all property of the bankrupt at thedate of bankruptcy, whether or not coming into possession or control of the court, shall be vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists."

In the 1950 anendment to Section 70(c), the distinction between propery in the possession of the bankrupt, and thus coming into the possession of the Bankruptcy Court at the date of bankruptcy, and prope y not so in possession was abolisled. The trustee was given the status of a creditor holding a lien through legal or equitable proceedings as to both types of property, that is, whether in the possession of the Bankruptcy Court or not. The reference to the power of the trustee as a judgment creditor with an execution duly returned unsatisfied was thus deleted as no longer necessary.

The 1952 amendment to Section 70(c) of the Bankruptcy Act made no substantial change. It merely clarified the section so as to eliminate the incongruity of the trustee having a lien onthe bankrupt's property. As stated in the House Report on the 1952 amendment:

"* * * Iowever it is now recognized that the 1950 amendment did not accurately express what was intended. Since the trustee already has title to all of

the bankrupt's property, it is not proper to say that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner. Accordingly, the language of Section 70(c) has been revised so as to clarify its meaning and state more accurately what is intended." House Report No. 2320 on S. 2234, 82d Cong., 2d Sess. (1952) 16.

Section 70(c) of the Bankruptcy Act as it now stands, reads as follows:

"• • • The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The most recent expression of Congressional intent may be found in House Report 745, Committee on Judiciary, 86th Congress, First Session, quoted extensively in the Sixth Circuit opinion here under review, which states in pertinent part:

"From 1910 to 1954 it was assumed that the rights of the trustee under 70e accrue as of the date of bankruptcy and no earlier. However, in Constance v. Harvey (215 F. 2d 575 (2d Cir., 1954), cert. denied 346 U. S. 913 (1955)), it was held that under Section 70e a trustee has the rights of an ideal hypothetical creditor who has acquired his claim prior to bankruptcy. • • •

The rights of a trustee under 70e are entirely derivative and dependent upon the existence of an actual creditor against whom the transfer might have been invalidated in the absence of bankruptcy. Those rights relate back to whatever date they first arose. Section 70e, on the other hand, gives the trustee the

status of a hypothetical judicial lien creditor whose rights arise as of the date of bankruptcy.

• • • The holding in Constance v. Harvey by injecting into Section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of Constance v. Harvey. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect transfers. The doctrine of Constance v. Harvey presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the Act. • • •"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 94

WM. G. LEWIS, Trustee,
Petitioner,
vs.
MANUFACTURERS NATIONAL BANK OF DETROIT,
Respondent

BRIEF FOR PETITIONER

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Respondent

BRIEF FOR PETITIONER

REPORTED OPINION

The following reported opinion was rendered in the within cause: *In re Todor A. Alikasovich, d/b/a Miami Cleaners & Tailors* (6 Cir., 1960), 275 F. 2d 454 (R. 12). Opinions of Referee and District Court are at R. 2 and R. 5, respectively.

JURISDICTION

Jurisdiction is conferred on this Court by §24c of the Bankruptcy Act, 11 USC §47c; and by 28 USC §1254. Petition for writ of certiorari was filed within applicable 90-day period and order granting said wit was issued by this Court on June 27, 1960 (R. 18).

STATUTES INVOLVED

1. The Constitution of the United States, Art. I, Sec. 8, cl. 4:

> "The Congress shall have Power • • • To establish • • • uniform laws on the subject of Bankruptcies throughout the United States."

2. Bankruptcy Act, Sec. 70c; 11 USC Sec. 110c:

> "The Trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

3. Bankruptcy Act §70e; 11 USC §110e:

> "(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the Trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the Trustee for the benefit of the estate: Provided, however, That the Court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the Trustee shall succeed to and may enforce the rights of such transferee or obligee. The Trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (4) of this subdivision e is valid under applicable Federal or State laws.

"(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

4. Michigan Compiled Laws 1948, §566.140, as amended by Public Acts of 1957, Act 233; MSA §26.929:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides, except when the mortgagor is a non-resident of the state, when the

mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county in which the property is located: Provided that no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage."[1]

QUESTION PRESENTED FOR REVIEW

Is a belatedly recorded chattel mortgage void as against a Trustee in Bankruptcy under §70c of the Bankruptcy Act without proof of the existence of an actual creditor who could void the mortgage, when state law provides that such mortgage is void against a simple contract creditor without a lien who extends credit in the interim between the execution and the recording of the mortgage?

STATEMENT OF THE CASE

This case involves the validity of a belatedly recorded chattel mortgage on an automobile as against the claims of the Trustee in bankruptcy of the mortgagor.

Prior to bankruptcy, the bankrupt had borrowed money from Manufacturers National Bank of Detroit, Michigan. To evidence the loan and secure its payment, on Novem-

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[1] The last proviso was added by Act 233 of 1957 and replaced the proviso which had been added by Act 153 of 1956. See *Hertzberg v. Associates Discount Corporation* (6 Cir. 1959) 272 F. 2d 6; cert. den. April 18, 1960. Act 233, in turn, has been replaced by Public Acts of 1959 No. 110 which provides that *any* mortgage is valid as against creditors if recorded within 10 days after its execution. This amendment has no effect on the problem presented herein. Under the 1959 Act, the problem presented by this case will still occur if the mortgage is recorded more than 10 days after its execution.

ber 4, 1957 he executed and delivered to the bank a promissory note and chattel mortgage on his 1953 Pontiac automobile. The chattel mortgage was filed by the bank with the Wayne County Register of Deeds on November 8, 1957. There was no evidence that any creditor had extended credit between November 4 and November 8, 1957 (R. 13).

About five months later, namely, April 18, 1958 the borrower filed a voluntary petition in bankruptcy in the District Court upon which an adjudication in Bankruptcy was duly entered (R. 13).

The mortgage in question was admittedly not a purchase money mortgage, and the 14 day grace period allowed by Act 233 of 1957 did not apply. Since the mortgage was not recorded immediately, the Referee in Bankruptcy held that it was void as against the Trustee in Bankruptcy under §70c of the Bankruptcy Act as interpreted by *Constance v. Harvey* (2 Cir., 1954), 215 F. 2d 571 (R. 13-14).

Under that decision, the Trustee, by virtue of §70c of the Bankruptcy Act, is given the rights of a hypothetical creditor who extended credit in the interim between the execution and the recording of the mortgage and who, on the date of bankruptcy, obtained a lien on the property of the bankrupt.

The District Court reversed, and the judgment of the District Court was affirmed by the Court of Appeals for the 6th Circuit on March 7, 1960.

SUMMARY OF ARGUMENT

(1) The powers granted to a Trustee by the Bankruptcy Act are not derived from the bankrupt or from creditors of the bankrupt, but are independent powers which are conferred by Congress. There are many instances in the Bankruptcy Act where a Trustee's power is greater than the power of the bankrupt or of any actual creditor of the bankrupt.

(2) By §70e of the Bankruptcy Act, Congress gives to a Trustee in Bankruptcy the powers of a hypothetical ideal creditor who, on the date of bankruptcy, acquired a lien on the property of the bankrupt. Included in said rights are the rights of a simple contract creditor without any lien who extended credit in the interim between the execution and the recording of a belatedly recorded mortgage.

(3) These powers of the Trustee derive from former §47a (2) of the Bankruptcy Act passed in 1910. Subsequent amendments have only clarified the position of the trustee.

ARGUMENT

I.

Six years ago the 2d Circuit, in *Constance v. Harvey* (2 Cir., 1954), 215 F. 2d 571; cert. den. 348 U. S. 913, held that where state law provides that a belatedly recorded chattel mortgage is void as against an interim contract creditor of the bankrupt, a Trustee, with his status as a creditor with a lien, could void the mortgage, even though it could not have been voided by any existing creditor of the bankrupt. The 6th Circuit, in the instant case, reached a directly contrary result. It is our position that the 2d

Circuit's application of the clear language of §70e was correct, and that the 6th Circuit was in error.

Contrary to the interpretation of the 6th Circuit, the Bankruptcy Act confers powers on a Trustee in Bankruptcy which are wholly independent of the powers of any existing creditor of the bankrupt. These are not derived powers nor are they powers to which the Trustee is subrogated. They are powers conferred on him by Congress exercising its paramount and exclusive power to pass a uniform law of bankruptcy. Const. Art. 1, §8, cl 4. The position of the petitioner herein is that the decision in *Constance v. Harvey,* (2 Cir. 1954), 215 F. 2d 571, cert. den. 348 U. S. 913, is merely another instance where the Trustee's powers are found by reference to the language of the Bankruptcy Act, and not by reference to the rights of creditors. Other examples may be listed as follows:

(1) §11 of the Bankruptcy Act, 11 U.S.C. §29, allows a Trustee two years from the date of the adjudication to institute legal proceedings, without regard to the statute of limitations applicable to creditors under state law.

(2) §60 of the Bankruptcy Act, 11 U.S.C. §96, gives the Trustee the right to recover a preference made by the bankrupt within four months prior to the date of bankruptcy. Many states, including Michigan, do not give creditors such a right under any conditions. See *Corn Exchange National Bank v. Klauder, infra,* where a transaction perfected as to all existing parties prior to bankruptcy was held to have been hypothetically perfected immediately before bankruptcy and, therefore, a voidable preference.

(3) §67a of the Bankruptcy Act, 11 U.S.C. §107a, gives the Trustee the power to invalidate judicial liens obtained within four months prior to the date of bankruptcy at a

time when the bankrupt was insolvent. We are aware of no state law which gives creditors similar rights.

(4) . §67d of the Act, 11 U.S.C. §107d, sets up a federal version of the Uniform Fraudulent Conveyance Act and gives the Trustee a right to void a fraudulent conveyance as defined in that section, without regard to whether or not an existing creditor could have voided it under state law.

(5) . Even §70e of the Act, 11 U.S.C. 110e, which requires the so-called "flesh and blood" creditor, gives the Trustee powers which are greatly in excess of those which the existing creditor has under state law. Under the decisions in *Moore v. Bay* (1931), 284 U.S. 4; *General Motors Acceptance Corporation v. Coller* (6 Cir. 1939), 106 F. 2d 584, cert. den. 309 U.S. 682, and *Miller v. Sulmeyer* (9 Cir. 1959), 263 F. 2d 513, cert. den. Oct. 12, 1959, the Trustee, if he finds a "flesh and blood" creditor as to whom a transaction is partially void, uses the powers of this "flesh and blood" creditor to void the entire transaction without regard to the extent of the powers of the actual creditor. Although *Moore v. Bay* has been the law for almost thirty years, some courts still find it difficult to apply it where no actual creditor of the bankrupt could void the entire transaction. Not only has it been the law for thirty years, but Congress, by passage of the Chandler Act in 1938 (Act June 22, 1938, 52 Stat. 840), adopted the ruling in §70e (2) by stating that *all* property affected by a fraudulent transfer passes to a Trustee free and clear of the claims of the transferee.

The foregoing are the outstanding examples of instances where the powers of a Trustee are not measured by the powers of existing creditors. The Trustee's powers are not derived from the rights of existing creditors. See *In*

re Kranz Candy Co. (7 Cir. 1954), 214 F. 2d 588, and *In re Consorto Construction Co., Inc.* (3 Cir. 1954), 212 F. 2d 676, and *Miller v. Sulmeyer, supra.*

It is clear that the Trustee has powers to void certain transactions of which no creditor could have complained. Yet, the Court of Appeals in the instant case held that:

> "The Trustee in Bankruptcy is not an innocent purchaser for value. He takes title to the bankrupt's property subject to all liens, claims and equities existing thereon. In fact, the Trustee, standing in the position of a creditor, holds about the lowest form of security."

R. 16, citations omitted.

This holding is contrary to the basic policy of the Bankruptcy Act, and to its interpretations. Many sections of the Act grant substantive powers to the Trustee. Under §70c, the Trustee stands full-panoplied with all of the powers of a creditor of the bankrupt who has obtained a lien on all the property of the bankrupt, whether or not such a creditor actually exists.

II.

The language of §70c is clear:

> "The Trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

It seemed clear enough to Judges Chase, Hincks and (Justice) Harlan in *Constance*. It was equally clear to Judges Clark, Medina and Waterman in *Conti v. Volper* (2 Cir. 1956), 229 F. 2d 317, where both sides, in their briefs, urged the 2d Circuit to overrule *Constance;* but the Court held that the clear language of §70c could not be disregarded.

An equally clear provision of the Bankruptcy Act was held by this Court to create a voidable preference against strong assertions that such a decision would result in the destruction of non-notification account receivable financing and despite the fact that the transaction was not voidable by existing creditors. *Corn Exchange National Bank and Trust Co. v. Klauder* (1943), 318 U. S. 434, which is discussed in more detail below.

The Court of Appeals in the instant case chose to base its opinion to a certain extent, on legislative history. This Court has held that "there is no need to refer to the legislative history where statutory language is clear." *Ex parte Collet* (1949), 337 U.S. 55, 61. The legislative history used by the Court of Appeals was a House Report of the 86th Congress in 1959, reporting on HR 7242, which purports to change the results required by *Constance*. Certainly such a report in 1959 can be of no assistance in determining the legislative intent of Congress in passing the Bankruptcy Act of 1910, the Chandler Act of 1938, or the amendments to §70c in 1950 and 1952.

In *Constance*, the 2d Circuit said:

> "Since an existing creditor, without notice of the chattel mortgage, could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under §70c of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—we think his position must

prevail over that of the mortgagor-appellant." (Citation omitted.)

In *Conti v. Volper, supra,* three different members of that Court said:

"* * * It is difficult to see how such plain language could be disregarded."

We need not go beyond the clear language of 70c. The section gives the Trustee the rights of a hypothetical ideal creditor who has obtained a lien on the date of bankruptcy, whether or not such a creditor actually exists.

III.

Given a belatedly recorded mortgage, the States have divided into two main groups in determining which creditors of the mortgagor can void the mortgage. In some states, the mortgage is void as to a simple contract creditor, usually called an interim creditor, who extends credit in the interim between execution of the mortgage and its recording,[2] without regard whether he obtains a lien before recording, or after recording, or not at all. See *Ransom & Randolph Co. v. Moore* (1935) 272 Mich. 31.

In other states, the mortgage is void only as to a creditor who fastens a lien on the property in the interim between execution and recording, usually without regard to when the lien creditor extended his credit.

---

[2] In those states where the mortgage is void as to all creditors, or to creditors after execution (subsequent creditors), or to creditors before recording (antecedent creditors), the mortgage will necessarily be void as to an interim creditor, *inter alia.* In Michigan, only the interim creditor can void the mortgage.

In both groups of States, §70c voids the mortgage where it has not been recorded prior to bankruptcy. But where the mortgage has been recorded prior to bankruptcy, §70c voids the mortgage only in those States where an interim contract creditor could have voided it. Since the Trustee's lien arises on the date of bankruptcy, it has no effect on a mortgage recorded before bankruptcy in a State which requires an interim lien creditor. Thus, the Trustee's lien does not "relate back", and *Constance* itself recognizes this important distinction.

The Court of Appeals in the instant case failed to make that distinction. It relied on *Holt v. Crucible Steel Co.*, (1912), 224 U.S. 262, and *In re American Textile Printers Co.* (D.C. N.J. 1957), 152 F. Supp. 901. The former case properly held that a mortgage was valid against a Trustee when it had been recorded prior to bankruptcy and when Kentucky law required the existence of an actual creditor who had actually obtained a lien in the interim between execution and recording. The latter case was cited by the Court of Appeals as having refused to follow *Constance*. This is a misreading of the case. *American Textile* properly distinguished itself from *Constance* on the ground that New Jersey law required the existence of an *interim lien* creditor. With this distinction in mind, it becomes obvious that *Constance* does not, as its critics have said, make of §70e a superfluity. §70e is still required where the state law requires an interim *lien* creditor. In those states, which include those adopting the Uniform Commercial Code, (See 1957 Text, §9-301(1)(b) and (3)), a belatedly recorded mortgage which is perfected before bankruptcy cannot be voided by §70c. In order to void such a mortgage the Trustee will still have to find a "flesh and blood" interim lien creditor and apply §70e. There are many states where §70e is still required, and it

is even required in Michigan in order to void a tardily recorded real estate mortgage. See CL '48 §623.83, Mich. Stat. Anno. §27.1582.

Despite the attacks of its critics, *Constance* does not make §70e superfluous. As always, each section has its advantages and disadvantages, and each has its own applications. They complement each other and, taken together, evidence a strong Congressional purpose to give the Trustee powers exceeding those of actual creditors.

IV.

Michigan law relating to the recording of chattel mortgages is clear and was followed in the Court below. Michigan has (before 1960) required that a chattel mortgage must be recorded immediately and that it is void as to an interim contract creditor. Although the statute has been amended three times in obvious attempts to avoid the results of *Constance*, the law applicable to the instant chattel mortgage required that the mortgage be recorded immediately. *Ransom & Randolph Co. v. Moore* (1935), 272 Mich. 31. *General Motors Acceptance Corporation v. Coller* (6 Cir. 1939), 106 F. 2d 584, cert. den. 309 U.S. 682; *In re Tobias* (WD Mich. 1957), 150 F. Supp. 288. Opinion below, R. 14.

The 4-day delay in the instant case in recording is not an immediate recording. The application of *Constance* to this situation means that the failure of the mortgagee to comply with the state law renders his mortgage void under the clear language of §70c.

Two decisions applying Michigan law serve to point up the rights of a Trustee under §70c. The first decision involved a real estate mortgage which had not been recorded on the date of bankruptcy. Since the Trustee under §70c

is armed with the rights of a levying creditor on the date of bankruptcy, and since on that date the real estate mortgage had not been recorded, and since Michigan law gives a levying creditor priority in such a situation, it might seem quite clear that §70c grants the Trustee priority. However, the problem is not that simple. Michigan law not only requires a levy, but requires that the levying creditor, without notice of the existence of the mortgage, take the affirmative act of recording a notice of his levy before he obtains such knowledge. CL '48 §623.83, Mich. Stat. Anno. §27.1582. In *Ashbaugh v. Becker* (ED Mich. 1936), 14 F. Supp. 465, it was held that the Trustee, as an ideal hypothetical creditor, was a hypothetical creditor without notice and was a hypothetical creditor who had recorded notice of levy, even though neither the Trustee nor an existing creditor had actually done so. For a similar decision, see *Sampsell v. Straub* (9 Cir. 1951), 194 F. 2d 228.

The second decision was *In re Urban* (7 Cir. 1943), 136 F. 2d 296. Although this case was decided by the 7th Circuit, it involved a Michigan chattel mortgage. Under Michigan law, a creditor who extends credit prior to the execution of the mortgage but who obtains a lien in the interim between the execution of a mortgage and its recording, is probably not entitled to priority over the mortgagee. See *Ransom & Randolph Co. v. Moore, supra.* In the *Urban* case the mortgage had not been recorded on the date of bankruptcy. The mortgagee argued that although the Trustee had a lien on that date, there was no showing that he *or any existing creditor* had extended credit in the interim between the execution of the mortgage and the date of bankruptcy. His hypothetical lien could have arisen as a result of credit hypothetically extended prior to the date of the mortgage. The Court, however, held that

the Trustee, as the ideal hypothetical creditor, as a member of the most favored class of creditors, took priority over the mortgagee.

Here again are two situations where the Trustee's rights were not measured by the rights of an existing creditor but were measured solely by reference to the clear language of §70c. And there has been no criticism of these cases, despite the fact that the mortgages in question may have been perfectly valid as against existing creditors. The Trustee's powers under §70c exist without regard to the powers of the bankrupt's creditors.

V.

Constance does not stand alone. It follows other decisions in defining the powers of a Trustee under §70c.

Perhaps the best description of the powers conferred upon the Trustee by §70c is contained in a case decided in 1911. *In re Calhoun Supply Co.* (DC Ala. 1911) 189 F. 537. This case was one of the first cases to follow the passage of §47a(2) in 1910, which was the predecessor to present §70c. It must be noted that the words "whether or not such a creditor actually exists" were not in the Act in 1910. The problem arose because Alabama law said that an unrecorded conditional sales contract was void as to judgment creditors. Under Alabama law, such a contract was void as to a creditor who obtained a judgment in the interim between execution and recording, without regard to when he extended credit, and without regard to when he obtained a lien on the property. See *McKay v. Trusco Finance Co. v. Montgomery, Alabama, infra.* The argument was made in the Calhoun case that unless the rights of a lien creditor necessarily included a judgment creditor, the contract was valid. The Court held that the

Trustee had the rights of a judgment creditor. It is not merely this holding of the court which is important, it is the reasoning which was used by the court at a time when the section of the Bankruptcy Act did not specifically state that the trustee has the rights of a lien creditor "whether or not such a creditor actually exists". The reasoning of the court was given as follows:

> "The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the states. The registration laws of some states include but one of many classes of such creditors. In that case the purpose of Congress is not to be frustrated as to the included class because other classes included in the amendment were not included also in the registration act of that particular state.
>
> "The breadth of language was used for the purpose of gathering in all classes protected by all local registration acts, and this purpose would be defeated by the construction contended for by the petitioner. 539.
>
> "The test is whether there exists a class properly within the language of the amendment and that of the Alabama registration act. It is conceded that a judgment creditor holding a lien by execution is such a class. The trustee, therefore, is vested with the right by the amendment and the registration act of that class to avoid unrecorded conditional sales." 540.

The importance of the decision lies in the court's use of the word "class". If there is a class of protected creditors, then the trustee has the rights of a member of that class who has levied on the property on the date of bankruptcy whether or not such a creditor exists.

Another line of reasoning has been used which results in precisely the same answer. In *Sampsell v. Straub* (9 Cir. 1951) 194 F. 2d 228; cert. den. 343 U.S. 927, the problem was the priority of the trustee's rights over a tardily recorded homestead exemption. Under the peculiarities of California law, an attachment or execution creditor could not have prevailed against the homestead rights of the bankrupt. However, under California law there is a "type of creditor" who would be superior to the homestead rights: a judgment creditor who had voluntarily recorded a notice of his judgment. In a previous decision reported at 189 F. 2d 379, the court had held that the trustee was not such a creditor. The rights of such a creditor do not arise from mere judicial proceedings. They arise from a voluntary act of a creditor in recording notice of his judgment. Since the trustee did not do so, he was not entitled to such rights. However, in this rehearing the Court reversed itself and held that the Trustee must prevail. The Court's reasoning was that there was a possibility that an actual creditor who had obtained a judgment prior to bankruptcy and who had recorded notice of his judgment could have obtained priority. Under §67a of the Bankruptcy Act, this priority could have been voided as to the creditor and preserved by the Trustee for the benefit of the estate if it had been obtained within four months prior to bankruptcy and at a time when the bankrupt was insolvent. No actual creditor had done this. But the Court said that because no actual creditor had done this, the trustee should not be powerless to avoid a tardily recorded homestead exemption." The Court said:

> "To this extent, therefore, the Trustee's powers under 70, sub. c, measured by what a creditor *might have done,* but *for the intervention of bankruptcy,* would be less than his powers measured by what

some creditor actually had done." (At 231; emphasis added.)

Here we have a case decided three years before *Constance v. Harvey* in which the Court stated that the Trustee's powers against a secret lien were to be measured by the powers of any type of creditor who might have prevailed against that lien even though such a creditor never existed. The Trustee was deemed to be in the class of creditors against whom the tardy homestead recordation was void.

At least two cases before *Constance* considered the point in time on which the Trustee hypothetically extended the credit which gave him his hypothetical lien. In both cases the courts held, in effect, that the time of extension of credit was some time after execution of the mortgage. Although, in both cases, the mortgages were not recorded before bankruptcy, both cases are important because they demonstrate that §70c can void a mortgage even where it is not shown that the mortgage is void as to an existing creditor.

The first of these cases is *In re Urban*, discussed *supra*. The second case is *McKay v. Trusco Finance Co. of Montgomery, Alabama*, (5 Cir. 1952) 198 F. 2d 431. In this case, decided two years before *Constance v. Harvey*, the court was even more specific as to the powers granted the trustee. A security device on an automobile had not been recorded on the date of bankruptcy. There was a problem as to whether the security was a conditional sales agreement or a chattel mortgage. The court ultimately held that it made no difference because the trustee's rights were superior to both a conditional sales vendor and to a chattel mortgagee.

Treating the security as a conditional sales contract, the court found that under Alabama law it was void as to "judgment creditors without notice thereof". Under Alabama law, it does not matter when the creditor's debt was contracted and it does not matter when he recovers possession by some form of levy. The controlling factor is that the creditor entered a judgment prior to the recording of the contract, without actual notice thereof. The court held that the trustee with his status as a lien creditor on the date of bankruptcy was a lien creditor who got his lien as a result of a judgment. Under Alabama law, the creditor need not necessarily obtain a lien in the interim. The court held that the fact that the trustee is a lien creditor can in no way detract from his rights as a lessor judgment creditor without a lien. But the court went even further. The court followed the *Sampsell* case, *supra*, and held that the trustee was the most favored creditor under Alabama law which, in the case of a conditional sales contract, is a creditor who obtained a judgment in the interim between the execution of the conditional sales contract and its recording, and who then filed a notice of his judgment, without actual notice of the existence of the contract.

The court then treated the security as a chattel mortgage. The court cited Alabama cases which held that Alabama law protects only creditors who extend credit after execution of the mortgage. It does not protect a pre-existing creditor who obtains a lien or judgment while the mortgage is off record if the claim arose prior to the execution of the mortgage. The facts were that the mortgage was executed on February 7, 1951. The Petition in Bankruptcy was filed three weeks later on March 1, 1951. There was no evidence of any debt contracted by the bankrupt in the period between the date of the mortgage and the

date of bankruptcy. In discussing the problem, the court said:

> "It seems to us however, that, under Section 70, sub. c, of the Bankruptcy Act, the actual existence of such a subsequent creditor is immaterial. It is true that the rights, remedies and powers vested in the trustee by that section are so vested 'as of the date of bankruptcy' and relate to the property of the bankrupt on that date. Nevertheless, the trustee has the status of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor exists. *It may be* that in the case of a belated recording prior to bankruptcy the trustee would have to bring himself within the terms of Section 70, sub. e (1) of the Bankruptcy Act (citing Collier). That question is not before us for here the contract was never recorded and possession was not delivered to the creditor until after bankruptcy. Under the facts of this case, Sec. 70, sub. c, is applicable." (Emphasis added.)

The importance of this case is that the 5th Circuit anticipated the decision in *Constance v. Harvey* by two years. In the foregoing language, the court did not specifically decide the problem as to what the result would be if the mortgage had been recorded prior to bankruptcy. However, it is interesting to note that its only citation for its hesitancy was Collier. The importance of the decision lies in the words "the actual existence of such a subsequent creditor is immaterial". The court realized that in order to hold the trustee's lien superior, it had to place him in a class of creditors who had extended credit subsequent to the execution of the mortgage. It is conceivable that the bankrupt had not contracted any debts at all in the three week interval between the date of the mortgage and the date of bankruptcy. Yet the court did not even consider this

possibility. The court's decision was then summarized as follows:

> "The most favored creditor in Alabama would be one who had secured a judgment *upon credit extended subsequent* to the execution of the contract and had either caused execution to be levied upon the automobile, or a certificate of the judgment to be recorded. Sec. 70, sub. c, vests the trustee with all the rights, remedies and powers of such a creditor." (At 435; emphasis added.)

This quotation specifically refers to the Trustee as a creditor who extended credit subsequent to the execution of the contract. And it goes further than that. It also goes on with the powers of a creditor who had obtained a judgment after the execution of the contract and who had levied on the automobile and caused a certificate of judgment to be recorded. This is the most favored creditor in Alabama, and these are the powers of the Trustee.

The cases cited in this section of our brief do not make up an exhaustive list of favorable authority. They are cited to show that *Constance* is not an anomaly, that other courts have reached similar decisions on similar problems, and that the powers of a Trustee are Congressionally defined—not creditor-derived.

VI.

Decisions subsequent to *Constance* are not numerous. The 2nd Circuit repelled an attack on its position in *Conti v. Volper, supra.* The 5th Circuit in *Brookhaven Bank & Trust Co. v. Gwin,* (5 Cir. 1958), 253 F. 2d 17, expressed a dictum which implied that it would follow *Constance,* but later contradicted itself by equally unauthoritative dictum in *Blackford v. Commercial Credit Co.* (5 Cir. 1959), 263 F. 2d 97.

The 9th Circuit in *Miller v. Sulmeyer, supra,* in a §70e case, stated that the mortgage in question could have been voided "by the creditor who wasn't but who might have been." The Court interpreted the Bankruptcy Act as allowing a Trustee to void a creditor's security, even though it is partially valid under state law or even wholly valid under some circumstances, because of the absence in fact of a certain type of creditor.

The New Jersey District in *In re American Textile Printers Co., supra,* properly distinguished *Constance* on the ground that New Jersey law required an interim lien creditor.

The Missouri District in *In re Billings* (1959), 170 F. Supp. 253, did not follow *Constance* and neither did the Court of Appeals in the instant case. Thus, cases subsequent to *Constance* are of no great assistance in determining the question.

VII.

We have anticipated and answered many of the critics of *Constance.* We have shown that the Bankruptcy Act does not limit the powers conferred on a Trustee to the powers held by existing creditors. We have shown that §70e is not superfluous. We have shown that *Constance* does not relate back the lien of the Trustee. We have shown that the preference sections, §60 and §67a, actually give the Trustee retroactive powers, in the sense that he can set aside hypothetically imperfect transactions which were actually perfected long before bankruptcy.

Perhaps the basic problem considered by the Court of Appeals was the fact that Michigan required immediate recording of a chattel mortgage and did not allow a reasonable time or a specified time within which to record. The

Michigan legislature, after two unsuccessful attempts, has finally solved the problem by the passage of Act 110 of Public Acts of 1959, which now allows 10 days for the recording of a chattel mortgage. The future application of *Constance* will thus be limited to cases where the mortgagee has delayed more than 10 days. The Michigan legislature could have completely eliminated the Michigan problem by providing that a belatedly recorded mortgage is void only as to creditors who obtain liens in the interim between execution and recording. Certainly the Michigan legislature was aware of *Constance,* yet it did not take the action necessary to completely insulate mortgagees from its application.

Constance does not create an insuperable practical problem. Even under §70e, a belatedly recorded mortgage is void as against an interim creditor and such a creditor can often be found. Telephones remain connected, electricity is supplied, gas is burned, and milk is delivered. See *In re Tobias* (WD Mich. 1957), 150 F. Supp. 288, where the milkman became an interim creditor; and this unpaid milkman, with his small claim, completely voided a substantial mortgage, although the delay in recording was only 23½ hours.

All of the criticisms of *Constance* were completely answered by this Court in *Corn Exchange National Bank & Trust Co. v. Klauder, supra.* The case arose under §60, which, at that time, provided that the time for determining when a transfer was made for the purpose of determining the four-month preference period was the date on which the transfer became perfected as against *bona fide purchasers* and creditors of the bankrupt. The assignee of accounts receivable, although he took the assignment with the acquiescence of many creditors, did not notify the debtors on the assigned accounts. Under Pennsylvania

law, the failure to notify the debtor meant that the assignment was void as to a subsequent good faith assignee of the accounts who did give such notice. *There was no such assignee in existence.* Nevertheless, this Court held that the clear language of §60 meant that the transaction was not perfected until immediately before bankruptcy because a *hypothetical bona fide* purchaser could have obtained rights superior to the actual assignee.

In this situation, even though the assignment was perfectly valid as against all creditors of the bankrupt, it was voidable by the Trustee under §60.

As stated above, the argument was made that the decision would seriously hamper the business of financing on accounts receivable security. Nevertheless, the Court struck down the assignment. The case was followed, as was *Constance,* by a considerable amount of critical literature and resulted in "corrective" legislation being passed by Congress and many of the states. The legislation adopted by Congress in 1950 by Act of March 18, 64 Stat. 24, eliminated the *bona fide* purchaser test and substituted the test contained in §60a (3), of when the transaction became perfected as against a hypothetical, simple contract creditor with a lien obtained by legal or equitable proceedings, "whether or not there are or were creditors who might have obtained such liens." The language was deliberately made similar to that of §70c. The similarity cannot be disregarded.

The criticisms of *Constance* are an echo of a long forgotten idea that an assignee for the benefit of creditors stands in the shoes of his assignor and has no better position than that of existing creditors. The Bankruptcy Act does not so limit the Trustee's powers but gives him certain superadded statutorily derived powers which are wholly

independent of the powers of the bankrupt or of his existing creditors.

These powers are the powers of the most favored class of creditors—whether or not there is an existing member of that class. They are the powers of the ideal hypothetical creditor—whether or not such a creditor actually exists. They are the powers of a creditor with a lien, and included in these powers are the powers of the ideal hypothetical creditor without a lien who has extended credit in the interim between the execution and recording of a tardily recorded chattel mortgage.

CONCLUSION

The judgment of the 6th Circuit should be reversed, and the mortgage of the respondent should be held void as against petitioner under §70c of the Bankruptcy Act.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 94

WM. G. LEWIS, Trustee;
Petitioner,
vs.
MANUFACTURERS NATIONAL BANK OF DETROIT,
Respondent

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent rejects Petitioner's statement of the question presented and believes that it may be more precisely stated as follows:

DOES SECTION 70c OF THE BANKRUPTCY ACT INVEST THE TRUSTEE WITH THE STATUS OF A FICTIONAL CREDITOR EXTENDING CREDIT AT ANY ADVANTAGEOUS TIME DURING AN UNLIMITED PERIOD PRIOR TO DATE OF BANKRUPTCY WITH THE RESULT THAT THE

TRUSTEE CAN AVOID A MICHIGAN CHATTEL MORTGAGE FILED OVER FIVE MONTHS PRIOR TO DATE OF BANKRUPTCY BECAUSE MICHIGAN LAW MADE SUCH MORTGAGE VOID AS AGAINST SIMPLE CONTRACT CREDITOR EXTENDING CREDIT DURING THE PERIOD BETWEEN DATE OF EXECUTION AND DATE OF FILING?

COUNTER-STATEMENT OF THE CASE

There is no factual issue in this case, but Respondent rejects Petitioner's statement as inadequate, and submits the following brief statement:

Respondent, a national banking association with its main office in Detroit, Wayne County, Michigan, is the holder of a note secured by a chattel mortgage properly executed and delivered by the Bankrupt under date of November 4, 1957 covering a 1953 Pontiac automobile. The Bankrupt gave the note and chattel mortgage in exchange for a loan from the Respondent made through its Grand River-Dundee branch office. After making a credit investigation of the Brankrupt, the proceeds of the loan were disbursed on November 5, 1957. On that date, the branch office forwarded the note and chattel mortgage to Respondent's downtown Michigan-Griswold office where on November 6 and 7, 1957 it was reviewed for proper figures, interest rate, and signature, etc., and processed for credit life insurance on the Bankrupt, machine accounting records and filing. The chattel mortgage was then filed with the Wayne County Register of Deeds at 10:21 a.m. on November 8, 1957. Wayne County was the proper county for filing said mortgage.

No evidence was introduced as to the existence of a creditor of the Bankrupt who became such between the

time of the execution and delivery of the chattel mortgage and the time of the filing of the chattel mortgage.

About five months later (April 18, 1958), the Bankrupt filed a voluntary petition in bankruptcy in the District Court upon which an adjudication in Bankruptcy was duly entered.

On June 13, 1958 the referee in bankruptcy held that the mortgage was void as against a trustee in bankruptcy. The District Judge reversed the order of the referee and the Sixth Circuit Court of Appeals affirmed the judgment of the District Court. Trustee applied to this Court for a Writ of Certiorari and Certiorari was granted on June 27, 1960.

SUMMARY OF ARGUMENT

Respondent's argument that the decision of the Court of Appeals for the Sixth Circuit should be sustained may be summarized as follows:

A. Consideration of the Michigan statutory background.

B. The construction of Section 70c reaffirmed by the Court of Appeals is sound and should be sustained because:

1. The history and genesis of present Section 70c clearly support such construction.

2. Express Congressional intent as to the last amendment to Section 70c (in 1952) clearly supports such construction and subsequent action by Congress confirms such intent.

3. The statutory context of Section 70c supports such construction and negates Petitioner's arguments.

4. The plain meaning of present Section 70c compels such construction.

C. Sound authority in other jurisdictions supports the Court of Appeals' construction and the only authority to the contrary (in the Second Circuit) has no valid basis.

D. Strong practical and policy considerations confirm the soundness of the decision by the Court of Appeals.

1. The mischievous effects of *Constance* on Chattel Mortgage financing.

2. The limitations problem.

3. Effect of Constance upon other commercial transactions.

ARGUMENT

PRELIMINARY STATEMENT

Petitioner requests this Court to reverse the decision of the Court of Appeals below which flatly rejected his contention that a trustee in bankruptcy can invalidate a Michigan chattel mortgage filed within four days after execution and over five months before date of bankruptcy by distilling from Section 70c of the Bankruptcy Act (11 U. S. C., Section 110c) a fictional status of interim creditor even though no actual interim creditor is shown to exist at date of bankruptcy or to have existed at any time prior thereto. Petitioner's proposition was similarly rejected by the District Court.

Contrary to Petitioner's suggestion in his brief (at pages 6-9), there is no issue here as to the source of the rights of a trustee in bankruptcy. That source is the Bankruptcy Act and Petitioner's claim depends entirely upon the narrow legal question as to the meaning of Section 70c. Petitioner does not urge or contend that there was an actual interim creditor giving the trustee a position of attack under Section 70e of the Bankruptcy Act (11 U. S. C., Section 110e). Nor is there any claim that Section 60 (11 U. S. C., Section 96), dealing with preferences, or Section 67 (11 U. S. C., Section 107), dealing with judicial liens and fraudulent transfers, are here involved.

While the foregoing states the precise issue before this Court, it should be emphasized that also involved is the broader concept of the true role of the trustee in bankruptcy.

It would seem clear from any basic text on bankruptcy and from the Bankruptcy Act itself that one major aspect of the trustee's role is the fair and equitable accommodation of the interests of secured and unsecured creditors in the bankrupt's estate within the compass of certain guide lines set forth in the statute and amplified by judicial decision.

Inherent in Petitioner's notion as to Section 70c, however, is a rewriting of this role with the trustee cast as an adventurer with letter of marque to voyage an indefinite period prior to date of bankruptcy in search of situations where the interposition of a hypothetical creditor reaps an advantage to the unsecured creditors which no one of them could rightly claim.

Respondent will proceed to demonstrate that Congress did not so intend.

A. THE MICHIGAN CHATTEL MORTGAGE FILING STATUTE.

Although this appeal is not based upon a difference as to the construction of the applicable Michigan chattel mortgage filing statute (Michigan Compiled Laws 1948, Section 566.140; Michigan Statutes Annotated, Section 26.929), a review of this statute and its recent amendments and of the judicial gloss thereon is appropriate here, both to place this case in its proper context and to indicate the extravagant consequences of Petitioner's position.

For many years prior to 1956, the Michigan statute read in pertinent part:

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides, * * *."

Under this language, the chattel mortgage, upon filing, becomes valid against future creditors and against creditors prior to the date of its execution, but remains vulnerable to attack by any interim creditor, that is, a creditor who extended credit during the period between time of execution and time of filing.

In *General Motors Acceptance Corporation v. Coller*, (6th Cir. 1939), 106 F. (2d) 584, cert. den. 309 U. S. 682, 60 S. Ct. 723, the Court ruled that the language quoted rendered void against a trustee claiming *under Section 70e* a chattel mortgage filed six days after execution where

there was an actual creditor who extended credit in the interim between execution and filing. Language in this opinion indicated that there was no basis in the Michigan statute for a reasonable grace period which would protect a mortgagee against an interim creditor.

In a subsequent line of decisions, the most recent and drastic of which is *In re Tobias,* 150 F. Supp. 288 (1957), the Federal District Courts have ruled that a trustee in bankruptcy, under Section 70e, could set aside any Michigan chattel mortgage if there existed an *actual* interim creditor with a provable claim. In *Tobias,* the chattel mortgage had been filed within twenty-four hours of its execution, but, during such period, an ice cream company had sold and delivered certain merchandise on account to the mortgagor, a restaurant owner.

The difficulties and unworkability of this chattel mortgage act had been recognized by the Michigan Legislature prior to the *Tobias* decision, for, effective August 11, 1956, Public Act 153 of 1956 added this proviso:

> "Provided, however, that any such mortgage shall not be void in the case of insolvency proceedings as against the creditors of the mortgagor if filed within 14 days from the date thereof."

The phraseology employed in establishing the fourteen-day grace period raised new questions as to legislative intent and the proper relationship of such proviso to the Federal Bankruptcy Act which were not resolved until the decision in *Hertzberg v. Associates Discount Corporation,* (6th Cir. 1959) 272 F. 2d 6; cert. den. 362 U. S. 950, 80 S. Ct. 861.

By Public Act 233 of 1957, effective September 27, 1957, the legislature replaced the troublesome 1956 proviso with the following language:

> "Provided, however, that no *purchase money mortgage* shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage."

Act 233 was in force when the mortgage involved in this case was executed and filed, but such mortgage is not a purchase money mortgage and, accordingly, the fourteen-day grace period was not available to shelter Respondent against a claim by the trustee under Section 70e if an actual interim creditor had been shown to exist.

There being no showing in this case of an actual interim creditor, the trustee based his attack upon his interpretation of Section 70c that such section not only permits him to hypothesize a creditor, but also to hypothesize that such creditor extended credit in the four-day period between execution and filing of this mortgage.

It was evident that the trustee's position in this case had the consequence of calling into question virtually every Michigan chattel mortgage (other than for purchase money), no matter how promptly filed, and to change the Michigan chattel mortgage from a security device to a snare for the unwary.

Accordingly, by Public Act 110 of 1959 the Michigan legislature again dealt with the problems created by the decisions under Section 70e and the challenges made by bankruptcy trustees under Section 70c by providing a ten-day grace period for all chattel mortgages.

Such act, however, would appear to be prospective only, leaving in jeopardy mortgages executed prior to its effective date, March 19, 1960. Further, the precise question involved in this case may arise even under the amendment effected by Public Act 110 where a mortgagee files

his mortgage more than ten days after date of its execution.

The question, moreover, is not limited geographically to Michigan or categorically to the chattel mortgage security device. As will be fully demonstrated in the argument which follows, Petitioner's notion creates problems in other states and in other major areas of the law affecting commerce and finance.

B. THE GENESIS OF SECTION 70c, CONGRESSIONAL INTENT WITH RESPECT TO THE 1952 AMENDMENT THEREOF, CONSIDERATION OF THE STATUTORY CONTEXT AND ANALYSIS OF THE LANGUAGE EXPRESSING SUCH INTENT ALL DEMONSTRATE THAT SECTION 70c FIXES THE TRUSTEE'S HYPOTHETICAL CREDITOR STATUS AT THE DATE OF BANKRUPTCY AND DOES NOT PERMIT THE TRUSTEE TO SEARCH BACK FOR MONTHS OR YEARS PRIOR TO SUCH BANKRUPTCY DATE IN QUEST OF A MORE ADVANTAGEOUS POSITION OF ATTACK.

In this portion of the argument, Respondent will demonstrate that a detailed review of present Section 70c in the light of its history, its purpose, its language and context compels the conclusion reached by the Court of Appeals, namely that the rights of the trustee thereunder are fixed at and as of the date of bankruptcy.

It is significant that neither Petitioner's brief nor the authorities cited by Petitioner contain any detailed analysis of Section 70c or any use of the customary techniques of statutory interpretation. Both Petitioner and the cases cited by Petitioner, to the extent pertinent, appear to beg this basic question of what this language means and to assume a meaning which ignores history and the statutory setting of Section 70c and distorts the present language of that Section. What follows will demonstrate the error in their approach.

1. Interpretation and Genesis of Section 70c Prior to the 1952 Amendment.

This Court unanimously announced in 1915 the general principle that a trustee's status under the predecessor of present Section 70c accrues *for all purposes* at the date of bankruptcy, stating with reference to Section 47(a)(2) of the Bankruptcy Act as amended in 1910:

> "Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? *When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed.* It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. • • • Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in §47a as amended. As this was not done, *we think the better view, and one which accords with other provisions of the act, is that the trustee takes the status of such a credior as of the time when the petition in bankruptcy is filed.* Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the state." (Emphasis supplied.)

Bailey v. Baker Ice Machine Company, 239 U. S. 268, 275-76, 36 S. Ct. 50, 54 (1915).

Essential to a true understanding of the question now before this Court is the fact that, between 1915 and 1952, nothing in the Congressional revisions of Section 47 and Section 70c and nothing in pertinent case law prior to 1954 provides even a colorable basis for Petitioner's position.

To document this fact in a manner convenient to the Court, Respondent has annexed hereto as Appendix 1 a comment on the genesis of present Section 70c from 1898 through its last amendment in 1952. Even a cursory reading of the statutory language through its various revisions prior to 1952 reveals Congressional affirmation of this Court's opinion in *Bailey*.

Petitioner has attempted to find some pedigree in case law prior to 1954 for the notion he urges upon the Court. There is none and it seems most convenient to document this by annexing as Appendix 2 a brief note as to the decisions cited by Petitioner, which establishes their irrelevancy.

In short, it was generally understood, prior to 1954, that the purpose of Section 70c was to create certain rights as of date of bankruptcy. Its meaning was deemed clear.

2. The 1952 Amendment—Congressional Intent.

In the 1950 general revision of the Bankruptcy Act, Section 70c was amended to read in pertinent part as follows:

> "* * * The trustee, as to all property of the bankrupt at the date of bankruptcy, whether or not coming into possession or control of the court, shall be vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists."

By this amendment to Section 70c, the distinction between property in the possession of the bankrupt, and thus coming into the possession of the Bankruptcy Court at the date of bankruptcy, and property not so in possession was abolished. The trustee was given the status of a creditor holding a lien through legal or equitable proceedings as to both types of property, that is, whether in the possession of the Bankruptcy Court or not. The previous reference to the power of the trustee as a judgment creditor with an execution duly returned unsatisfied was deleted as no longer necessary.

In accomplishing the desired purposes, however, the language of the 1950 amendment involved the anomaly of conferring upon the trustee a lien even upon that property of the bankrupt to which the trustee already had title.

In order to remove the anomaly created by the language of the 1950 amendment, Congress enacted the 1952 amendment which changed Section 70c to read in pertinent part:

> "• • • The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt *could have obtained a lien* by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists." (Emphasis supplied.)

Petitioner's position rests solely upon the phrase "could have obtained a lien" inserted by the 1952 amendment, but his attempt to justify new doctrine upon the basis of this phrase is expressly negated by Congress.

The narrow Congressional intent as to the purpose of this 1952 amendment is clearly stated in House Report No. 2320 on S. 2234, 82nd Congress, 2nd Sess. (1952) as follows:

> "*Section 23(c) of the bill makes a clarifying change in Section 70(c) of the Act.* Section 70(c) was amended in the last Congress (Public Law 461, 81st Cong., Act of March 18, 1950), simplifying the subdivision and conforming it to the amended section 60a. However, it is now recognized that the amendment did not accurately express what was intended. Since the trustee already has title to all of the bankrupt's property, it is not proper to say that he has the rights of a lien creditor upon his own property. What should be said is that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner. *Accordingly, the language of section 70(c) has been revised so as to clarify its meaning and state more accurately what is intended.*" (Emphasis supplied.)

As indicated by the italicized language in this House Report, the 1952 amendment was merely a *clarification* of some unfortunate language and did not signal a new and major departure in policy.

That this was and is the Congressional intent as to the scope of Section 70c is further confirmed by Congressional reaction to the contrary reading by the Second Circuit Court of Appeals.

After the decision in *Constance v. Harvey*, 215 F. 2d 57 (2d Cir. 1954) cert. den. 348 U. S. 913, 75 S. Ct. 294, action was initiated to correct the *Constance* error, and clarifying language was introduced as part of H. R. 7242. In favorably reporting this language, the House Committee on Judiciary stated in House Report 745, 86th Congress, First Session (August 3, 1959):

> "From 1910 to 1954 it was assumed that the rights of the trustee under 70c accrue as of the date of bankruptcy and no earlier. However, in *Con-*

stance v. Harvey, 215 F. 2d 575 (2d Cir., 1954), cert. denied 346 U. S. 913 (1955), it was held that under Section 70c a trustee has the rights of an ideal hypothetical creditor who has acquired his claim prior to bankruptcy. * * *

* * * The holding in *Constance v. Harvey* by injecting into Section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of *Constance v. Harvey*. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect transfers. The doctrine of *Constance v. Harvey* presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the Act. * * *"

H. R. 7242 passed both the House and Senate in the recent session of Congress and was sent to the President for signature, but the President vetoed the bill on September 21, 1960 because of certain other provisions therein which dealt with Federal tax lien priorities*

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*The President's veto message stated:

"I have withheld my approval of H. R. 7242, 'To amend sections 1, 57j, 64a(5), 67b, 67c, and 70c of the Bankruptcy Act, and for other purposes.'

"I recognize the need for legislation to solve certain problems regarding the priority of liens in bankruptcy, but this bill is not a satisfactory solution. It would unduly and unnecessarily prejudice

(Continued on next page)

3. Petitioner's Position is Negated by the Statutory Context of Section 70c.

Petitioner's effort to distill a new substantive rule from the 1952 amendment not only ignores express Congressional intent as to the scope of Section 70c, but also ignores other provisions in the Bankruptcy Act.

For example, consider the relationship of Petitioner's version of Section 70c to Section 70e. As noted in House Report 745, *supra,* Petitioner urges that the substance of Section 70e be injected into Section 70c. Petitioner argues (Br. 12) that occasions may arise where resort to Section 70e might still be necessary and, therefore, Section 70e is not rendered completely superfluous by his position. This argument misses the point that Congressional creation of certain rights under Section 70e which *must be derived from an actual existing creditor* with a provable claim at date of bankruptcy strongly negates an intention to authorize the trustee under 70c to unsettle security arrangements perfected prior to bankruptcy where no actual creditor was prejudiced by any delayed compliance with state filing or recording laws.

(Continued from preceding page)

the sound administration of Federal tax laws. In some cases, for example, mortgages would be given an unwarranted priority over Federal tax liens even though the mortgage is recorded after the filing of the tax lien.

"This and other defects of the bill can, I believe, be corrected without compromising its primary and commendable purpose. The Treasury Department and the proponents of H. R. 7242 have been working toward solution of recognized problems in present law. Further cooperative efforts should produce satisfactory legislation that would avoid the undesirable effects of this bill."

C. C. H. Bankruptcy Law Reporter, Report Letter #138 dated September 21, 1960.

Moreover, it must be emphasized that Congressional policy in striking a proper balance between secured and unsecured creditors has been formulated with due recognition that there must be some repose in arrangements made between the bankrupt and his creditors prior to bankruptcy. Thus Section 60 of the Bankruptcy Act (11 U. S. C., Section 96) does not permit a trustee to set aside preferential transfers unless they were made within four months of the date of bankruptcy. Similarly, Section 67a(1) (11 U. S. C., Section 107a(1)) has a four-month limitation on the voidability of attachment and other liens obtained by creditor process and even Section 67d (11 U. S. C., 107d) has a one-year limitation upon attacks against fraudulent transfers.

Petitioner, however, would have this Court ignore this Congressional policy of repose after a reasonable time elapses prior to bankruptcy and declare that Congress by the 1952 amendment of Section 70c made a major departure from such policy (though preserving the fixed time limitations in the other sections above noted) which permits a trustee to attack all manner of security transactions entered into for contemporaneous consideration and in good faith years prior to bankruptcy so long as the trustee's imagination can evoke a hypothetical situation in which a hypothetical creditor might have had such right.

Petitioner is saying in effect that a creditor is secure in taking preferences more than four months before bankruptcy can perfect a lien by attachment or other process more than four months before bankruptcy and can even engage in transactions in fraud of other creditors so long as he does so more than one year before bankruptcy. If, however, a creditor enters into a bona fide security arrangement for contemporaneous consideration and delays one day more than the time allowed by state law to perfect

this security by filing or recording, such delay is fatal, even though it occurs many years before date of bankruptcy and even though no creditor is prejudiced thereby.

It is noteworthy that Petitioner has nowhere attempted to urge that his position is either equitable or sensible.

4. Analysis of the 1952 amendment demonstrates that Petitioner's position involves poor grammar as well as bad law.

Petitioner strains credulity in asserting that Congress in 1952 intended to make such a major extension of the trustee's rights, contrary to policies imbedded in Sections 70c, 60 and 67 of the Bankruptcy Act, although (i) there is no comment upon such extension in any of the legislative history, (ii) the existing comment by Congress negates any intention to make such change and (iii) no comment upon such change can be found in any of the authorities in the field until provoked by a decision of the Second Circuit Court of Appeals two years after the 1952 amendment. In short, Petitioner has no real basis to justify his position in terms of legislative history or Congressional intent, and must, it would seem, rely upon exegesis of the text itself.

Neither Petitioner's brief nor the cases he relies upon reveal any analysis of the language of present 70c and it is perhaps this very lack of analysis which created the conflict before this Court.

Petitioner reads Section 70c to mean: "If a hypothetical creditor can be imagined in a situation existing any time prior to bankruptcy, and such fiction produces a creditor who could have obtained a lien on Bankrupt's property at date of bankruptcy, then trustee is vested with a lien thereon."

This reading ignores important and careful language of qualification in Section 70c.

First, the phrase "*upon which* a creditor could have obtained a lien by legal or equitable proceedings at date of bankruptcy" clearly refers back to and defines the noun "property".

Next, having defined the property involved (and, as noted above, this was the only purpose of the 1952 amendment), the language vests the trustee *as of date of bankruptcy* with "all the rights, remedies and powers of a creditor *then* holding a lien thereon by such proceedings, whether or not *such* a creditor (i. e., a creditor holding a lien thereon at date of bankruptcy) actually exists."

Petitioner's semantic error, in short, lies in ignoring the careful qualifications and clear back references in the statutory text itself. It is obvious that the *statutory* hypothetical creditor comes into fictional existence and his status is fixed for all purposes at date of bankruptcy, and not before.

Respondent's textual analysis, it is submitted, is not only grammatically sound, but completely in accord with this Court's expression in *Bailey*, quoted above.

Finally, it should be emphasized that even if Petitioner could find an ambiguity in this language, it would defy probability and good sense to conclude that Congress intended to make a major change in bankruptcy law by resort to ambiguity or nuance.

C. THE POSITION OF THE COURT OF APPEALS IN THIS CASE IS SOUND AUTHORITY AND FINDS SUPPORT ELSEWHERE. THE ONLY AUTHORITY TO THE CONTRARY IN THE SECOND CIRCUIT IS NOT INFLUENTIAL.

Appendix 2 documents the fact that Petitioner's authorities outside the Second Circuit are irrelevant. Indeed, even Petitioner admits the irrelevancy of many of these cases to the question before this Court and merely cites them in an effort to find analogies to support his position. This effort encounters the familiar difficulties of trying to draw conclusions about bananas from an examination of apples.

One thing is clear from Petitioner's brief. The only pertinent authorities supporting his position are two cases in the Second Circuit, *Constance v. Harvey, supra,* and *Conti v. Volper,* 229 F. 2d 317 (2d Cir., 1956). The following discussion of these decisions will indicate their error.

The facts of *Constance v. Harvey, supra,* were as follows: On November 23, 1949 Constance sold to Reilly, the bankrupt, residing in the town of Watervliet, Albany County, New York, a roadside diner located in the City of Albany, New York. The purchase price was $35,000, payable $15,000 in cash and $20,000 by a purchase money mortgage executed by Reilly in favor of Constance. On November 25, 1949, the attorney for Constance sent copies of the mortgage to the County Clerk of Albany County and the Town Clerk of Watervliet for filing, together with the appropriate filing fees. The copy of the mortgage sent to the Albany County Clerk was duly filed but the copy sent to the Watervliet Clerk was returned with a notation, "Filed in Albany."

It was admitted that Watervliet was the only proper place of filing and the filing in the Albany County Clerk's office was of no avail. It was not until October 5, 1950, nearly eleven months after its execution, that the mortgage was properly filed with the Watervliet Town Clerk. Reilly was adjudicated a bankrupt on October 23, 1951. The sole asset of the estate was the diner which was sold by the trustee for $22,150 against which proceeds Constance claimed a valid lien of $15,650, the unpaid balance of the purchase price of the diner.

The Court held that the mortgage was not seasonably filed under the New York law, and then approached the question of what effect, if any, the belated filing would have under Section 70c of the Bankruptcy Act. The court in its original opinion held that if the chattel mortgage was filed prior to the date of bankruptcy, Section 70c of the Bankruptcy Act would not help the trustee, stating:

> "Hence under Sec. 70, sub. c the Trustee did not have the status of a lien creditor with respect to this property unless the petition in bankruptcy was filed *prior* to October 5, 1950, when the chattel mortgage was filed by the Watervliet Town Clerk. 4 *Collier on Bankruptcy*, pp. 1272, 1273, 1287-1293."

The Court then, before remanding the case to the district court, *sua sponte*, reversed its position, stating at page 575:

> "Since an existing creditor without notice of the chattel mortgage, could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under Sec. 70, sub. c of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—*Hoffman v. Cream-O-Products*, 2 Cir., 180 F. 2d 649, certiorari denied 1950, 340 U. S. 815, 71 S. Ct. 44, 95 L. Ed. 599—we think his position must prevail over that of the mortgagee-appellant."

As indicated, the only case the Court relied upon in rendering its final decision was *Hoffman v. Cream-O-Products.* In that case the conditional bill of sale was filed for record in the proper Register's Office but the contemporaneously executed written agreement by which the parties specified the purchase price of the machines and the time and manner of payment thereof, was *never* filed for record. The failure to file this supporting document invalidated the reservation of title. Thus, the *Hoffman* case was simply one of many cases that have held that, if the security instrument is not properly filed, as required by local law, prior to the date of bankruptcy, the trustee prevails because his lien under the provisions of Section 70c is superior to that of a creditor whose lien is invalid, and who thus has no lien at all. The *Hoffman* case does not support the decision rendered in *Constance.*

The second case, *Conti v. Volper,* which follows the *Constance* decision, is an abbreviated one. The full text of the decision is as follows:

> "*Constance v. Harvey,* 2 Cir. 1954, 215 F. 2d 571, reluctantly followed by Judge Byers, may seem to reach an inequitable result, but Sec. 70, sub. c, of the Bankruptcy Act, 11 U. S. C. A., §110, sub. c, provides: 'The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists'; and it is difficult to see how such plain language could be disregarded."

The district judge in this same case (*sub nomine In re Gondola Associates,* 132 F. Supp. 205) found it difficult to

reconcile his decision with the equitable purposes of the Bankruptcy Act, but felt bound by *Constance v. Harvey*. He stated at page 205:

> "• • • The result here reached seems incongruous: a state statute enacted to protect creditors who are such at a given date is held to operate in favor of a trustee in bankruptcy who really stands in empty shoes, for he occupies a space which does not exist, since there is no creditor who might enforce the right which he asserts."

It is significant that neither *Constance v. Harvey* nor *Conti v. Volper*, made any reference to the purpose of the Bankruptcy Act or Section 70c; that the Second Circuit did not consider the relationship of Section 70c and 70e or other sections of the Act; that they did not even mention the Congressional intent and history of Section 70c, nor attempt any analysis of the language they purported to interpret. Rather, the Second Circuit has merely wrenched the words "could have obtained a lien" out of context of Section 70c and given them an effect contrary to their clear meaning and the Congressional intent.

Further, the *Constance* decision was an abrupt departure from previous interpretations of Section 70c without any reliance on precedent and without consideration in the opinion of the policy matters involved. Prior to *Constance* all of the cases held that if the lien instrument was filed prior to the date of bankruptcy, even though untimely filed, Section 70c by itself was of no value to the trustee. Where filing preceded bankruptcy, the trustee must prevail if at all under Section 60 of the Act if within 4 months prior to bankruptcy, or under Section 70e of the Act and prove the existence of an actual interim creditor on whose behalf the trustee could then proceed for the benefit of the estate.

The Court in *Constance v. Harvey, supra*, without giving any consideration to previous decisions, in effect held that all the previous cases were in error and that the trustee's lien at the date of bankruptcy would be superior to a creditor whose security instrument is filed prior to the date of bankruptcy, even if there was no creditor who could complain.

The *Constance v. Harvey* decision has been severely criticized by scholars and authorities in the field. Benjamin Weintraub, Harris Levin and Howard N. Beldock in *The Strong Arm Clause Strikes the Belated Chattel Mortgage*, 25 Ford. L. Rev. 261 (reprinted in *Journal of National Association of Referees in Bankruptcy*, Vol. 31, No. 2, page 35 at 39, April, 1957), say:

> "The United States Court of Appeals for the Second Circuit has now twice stated its interpretation of section 70(c) of the Bankruptcy Act. Secured lenders and anyone claiming through them must beware of the rights, remedies and far reaching powers of the strong-armed trustee in bankruptcy. In brief, it is submitted that the status gived a trustee by the Court's interpretation of section 70(c), as an ideal hypothetical creditor who can reach back to a date anterior to the filing of a bankruptcy petition, *is unsound and constitutes an erroneous interpretation of the section.* It is significant that the decision in *Constance v. Harvey* has been recently disapproved by a resolution of the National Bankruptcy Conference.[52] (Emphasis supplied.)

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[52] See Summary of Proceedings, National Bankruptcy Conference, 1956 Annual Meeting, Resolution No. 36: 'Resolved, that it is the sense of the National Bankruptcy Conference that the trustee in bankruptcy gets his standing under Section 70(c) as of the date of the filing of the petition, with no privilege of relation back and without prejudice to such rights as the trustee might have under Section 70(e) or any other provision of the Bankruptcy Act.'"

Likewise, Charles Seligson, Professor of Law at New York University School of Law, and one of the authors of *Collier on Bankruptcy*, in Creditors' Rights, (reprinted in *Journal of National Association of Referees in Bankruptcy*, Vol. 31, No. 4 page 113 at 118, October, 1957) said:

> "That the doctrine of the *Constance* case *compels an inequitable result is hardly open to question.* In the absence of bankruptcy, no creditor could have challenged the mortgage in the *Conti* case save one who was such at the time the chattel morgage was filed. A creditor with a claim coming into existence after the filing of the chattel mortgage could not do so, however long the delay in filing. (*In re Myers*, 19 F. 2d 600 (N. D. N. Y. 1926).). Nevertheless, the trustee in bankruptcy, who was not appointed until long after the filing of the mortgage and whose title and rights generally arose as of the date of the filing of the bankruptcy petition, was permitted to take action that no creditor at bankruptcy could take. The trustee represents all creditors. Thus, the avoidance of the chattel mortgage inured to the benefit of the general creditors, not one of whom was injured by the belated filing. These general creditors were unjustly enriched at the expense of the mortgagee, whose rights under local law were disregarded. It is inconceivable that Congress could have intended such an inequitable result in fashioning the strong-arm provisions of Section 70(e).
>
> This doctrine does not seem to have been followed in any other jurisdiction." (Emphasis supplied.)

Similarly in Marsh, *Constance v. Harvey*—"The Strong-Arm Clause" Re-evaluated, 43 Calif. L. Rev. 65, 73-74 (1955) it is stated:

> "Section 70(e) permits the trustee to exercise the right under state or federal law of any actual creditor having a provable claim to avoid any transfer made or suffered by the bankrupt * * *. Under

the rule of the *Constance* case the trustee under the strong-arm clause can represent a hypothetical creditor who extended credit at whatever time is most advantageous to him. It is apparent that the rights of such a hypothetical creditor would always be equal to or greater than those of any actual creditor and, therefore, if this interpretation is adopted Section 70(e) has become superfluous for the purpose of avoiding transfers by the bankrupt. The trustee should always proceed under Section 70(e).

"• • • (A)s long as Section 70(e) remains in the Act, it is at least arguable that it evidences an intent on the part of Congress that in some conceivable circumstances the rights of the trustee to avoid a transfer by the bankrupt should be measured by the rights of the actual creditors having provable claims • • •."

The foregoing citations and excerpts do not exhaust the considerable body of critical literature provoked by *Constance*. Additional materials are collected and reviewed in a comment in *57 Michigan Law Review*, 1227 (June 1959).

In sharp contrast to the cursory expressions on this question by the Second Circuit Court, the Court of Appeals for the Sixth Circuit supported its decision in this case by a careful opinion rejecting an over-simple literal approach to this important question and setting forth in detail its reasons for such rejection. The District Court below did likewise.

Similarly, in the Western District of Missouri, the Court in *In re Billings*, 170 F. Supp. 253 (1959) carefully examined and rejected the *Constance* position. The Fifth Circuit has indicated its reluctance to accept the mischievous consequences of *Constance*, *Blackford v. Commercial*

Credit Corporation, 263 F. 2d 97 (5th Cir. 1959), Note 14 at pp. 111 and 112. Very recently the Tenth Circuit Court of Appeals was presented with a set of facts where the *Constance* notion would be applicable and adopted a position parallel to that of the Sixth Circuit, holding that Section 70c gave the trustee a status for all purposes as of date of bankruptcy and was inoperative against a chattel mortgage perfected prior thereto. *Bergin v. Waterson,* 279 F. 2d 193 (10th Cir. 1960).

We believe that the foregoing case discussion and the consideration of cases in Appendix 2 clearly establishes that (i) the *Constance* decision has been rejected outside the Second Circuit and, (ii) even the District Courts in the Second Circuit have found it troublesome.

D. STRONG PRACTICAL AND POLICY CONSIDERATIONS CONFIRM THE SOUNDNESS OF THE CONSTRUCTION ADOPTED BY THE COURT OF APPEALS.

1. The Mischievous Effects of Constance on Chattel Mortgage Financing.

The chattel mortgage is and has long been one of the major security devices in commerce and finance. Not only do most installment purchases of automobiles involve a chattel mortgage, as in this case, but also commercial loans to businesses large and small are very often secured in whole or in part by chattel mortgages.

It is evident that Petitioner's position in this case places in jeopardy substantially all of the many millions of dollars of loans secured by chattel mortgages (other than purchase money mortgages) during the effective period of Public Act 233 of 1957 (September 27, 1957, to March 19, 1960), for the validity of the security interest is subject to a mortgagor's decision to file in bankruptcy or the

decision of general creditors to initiate involuntary proceedings.

In sharp contrast to this Michigan situation is that existing in the State of New York when *Constance v. Harvey* was decided. New York security law gave the mortgage lender a reasonable time to file the mortgage and reasonable diligence resulted in a security interest good against all creditors. Thus, the Second Circuit Court of Appeals may very likely have supposed that the rule enunciated in *Constance v. Harvey* penalized only the dilatory and it seems reasonable to surmise that if that Court's attention had been directed to a situation such as that in Michigan, it would have been reluctant indeed to destroy a major security device long established and daily relied upon in good faith in the financing of consumer needs and the needs of business and commerce.

Petitioner is fully aware of the drastic results of his position and yet he has advanced no argument that these results are reasonable or equitable or in harmony with the policy of the Bankruptcy Act or of the Michigan Chattel Mortgage Law.

Clearly, his position cannot be justified in terms of the policy against secret liens expressed in the Michigan Act, for the Michigan policy is clearly limited to protecting interim creditors acting without full knowledge of the borrower's financial position and has nothing to do with the mythical creditor upon whom Petitioner must rely.

Nor are the drastic effects of the *Constance* doctrine limited to states such as Michigan or California—see, e. g., *Wolpert v. Gripton*, 213 Cal. 474, 2 P. 2d 767 (1931)—which had or have an immediate recording requirement.

As *Constance* itself held, even in the many states where a statutory grace period or "reasonable time" concept obtains, a belated filing leaves the chattel mortgage apparently forever subject to attack. Respondent respectfully submits that nowhere is the inequity of such a rule better demonstrated than in the facts of *Constance* itself.

2. The Limitations Problem.

As previously noted in Section B.3. of this brief, Congress has expressly placed certain time limitations upon the trustee's power to attack various transactions occurring more than a stated period prior to date of bankruptcy.

Assuming Petitioner's notion that Section 70e is *sui generis* and has no relationship with this policy of repose expressed in the Bankruptcy Act, how far in the past can the ambulatory hypothetical creditor rummage? Once the Congressional birthdate (the date of bankruptcy) is abandoned as the point in time to which reference must be made in ascertaining the trustee's rights under Section 70e, where will the courts find guidance on this question? Indeed, can there be any logical time limitation on the trustee in such a case?

Perhaps Petitioner would limit his fantasy with a companion fantasy that the hypothetical creditor would be barred by the state statute of limitations hypothetically running against the hypothetical creditor whose rights the trustee is claiming at date of bankruptcy. Such a fantasy limitation would project various time limitations based on the statute of limitations applicable to the hypothetical contract creditor, would be inconsistent with the policy of the bankruptcy law, which brings uniformity of limitations to other transactions regardless of the state of oc-

currence, and would purport to preclude the trustee by the running of time before his hypothetical rights had even accrued. Moreover, if the trustee is such an "ideal" creditor under Section 70c, so that by Petitioner's argument he has the rights of a hypothetical creditor long prior to the date of bankruptcy, then even more clearly will a hypothesized state statute of limitations be ineffective as a time bar. For just as the trustee's hypothetical creditor may be one assumed to be without notice when actually notice has been given to others or one who has recorded when there was no actual recording,* so too would that hypothetical creditor be one who came within the state statutory provisions *suspending* the limitation. Thus any companion fantasy of a state-generated time limitation would not be effective to limit the trustee's ability to roam indefinitely into the past.

3. Effects of *Constance* upon other Commercial Transactions.

Discussion to this point has centered on the effects of Petitioner's position under one portion of security law, the chattel mortgage filing statutes. The mischief is not limited to this area alone.

For example, Michigan has a Bulk Sales Act (as do other states) which requires notice to all creditors of the seller under certain conditions, Michigan Compiled Laws 1948, Section 442.1; Michigan Statutes Annotated, Section 19.361. Assuming a bulk sale long before the seller filed a petition in bankruptcy, and assuming all actual creditors had been notified, the trustee under the *Constance* theory could assert the rights of a hypothetical creditor without

*See *Commercial Credit Co., Inc. v. Davidson*, (5th Cir., 1940), 112 F. 2d 54, and *Sampsell v. Straub*, (9th Cir., 1951), 194 F. 2d 228; cert. den. 343 U. S. 927, 72 S. Ct. 761.

notice existing at the time of sale and thus destroy a good faith arrangement completed years before.

Again, Michigan has a Bulk Mortgage Act (Michigan Compiled Laws, 1948, Section 442.51; Michigan Statutes Annotated, Section 19.371) with notice requirements which could not be discharged as to the hypothetical creditor. This would present a similar problem.

Examples might be added, from Michigan and from other states, but the foregoing seems sufficient to indicate that Petitioner's position drastically affects myriad relationships and transactions in commerce and finance.

Clearly, Petitioner cannot avoid the force of these practical considerations by the argument that these are problems for the legislature or Congress and not for the courts. This position collapses upon examination, for it seems evident that it was *Constance v. Harvey* that changed the law and this Court is merely being asked to recognize and to avoid the error of the Second Circuit Court of Appeals and the consequent mischief created by its decision.

It is one thing when a Court, after full consideration, applies a clear Congressional or other legislative mandate; it is quite another when a Court, with no consideration of Congressional intent or legislative history, fastens a new meaning upon a statute contrary to the meaning theretofore generally accepted.

It is submitted that this Court in its function of unifying and purifying Federal law may properly put an end to the erroneous construction of Section 70c urged by Petitioner.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this Court should affirm the Sixth Circuit Court of Appeals in its holding that Section 70c does not empower the trustee to stand in the empty shoes of a fictional intervening creditor and to set aside a chattel mortgage otherwise perfected under state law.

Respectfully submitted,

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October —, 1960.

APPENDIX 1

HISTORICAL DEVELOPMENT OF SECTION 70c

The early antecedent of present Section 70c, the so-called "strong arm clause," was Section 70a(5) of the Bankruptcy Act of 1898 which vested in the trustee the title of the bankrupt to property "• • • which might have been levied upon and sold under judicial process against him." The adjudication in bankruptcy did not operate as the equivalent of a judgment or attachment or other specific lien upon the property and where there was no actual creditor who had acquired a lien before bankruptcy, the trustee was not in a position to attack the validity of another lien or transaction.

Accordingly, Congress in the 1910 amendment to the Bankruptcy Act vested the trustee with all of the lien rights which any creditor could have acquired under state law as of the date of bankruptcy. The language of Section 47a(2) (considered by this Court in *Bailey v. Baker Ice Machine Company*, 239 U. S. 268, 36 S. Ct. 50, 1915) was as follows:

> "Trustees shall respectively: • • • (2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment

creditor holding an execution duly returned unsatisfied. * * *"

The Chandler Act of 1938 retained the substance of amended Section 47a(2) with some minor changes in phraseology, but shifted the section to become Section 70c. The 1938 version of Section 70c, leaving out the first sentence which is not pertinent, read:

> "* * * The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

That is the way this section stood until the 1950 amendment. The 1950 version of Section 70c, again leaving out the first sentence which is not applicable, read:

> "* * * The trustee, as to all property of the bankrupt at the date of bankruptcy, whether or not coming into possession or control of the court, shall be vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists."

In the 1950 amendment to Section 70c, the distinction between property in the possession of the bankrupt, and thus coming into the possession of the Bankruptcy Court at the date of bankruptcy, and property not so in posses-

sion was abolished. The trustee was given the status of a creditor holding a lien through legal or equitable proceedings as to both types of property, that is, whether in the possession of the Bankruptcy Court or not. The reference to the power of the trustee as a judgment creditor with an execution duly returned unsatisfied was thus deleted as no longer necessary.

The 1952 amendment to Section 70c of the Bankruptcy Act made no substantial change. It merely clarified the section so as to eliminate the incongruity of the trustee having a lien on the bankrupt's property. As stated in the House Report on the 1952 amendment:

> "• • • However it is now recognized that the 1950 amendment did not accurately express what was intended. Since the trustee already has title to all of the bankrupt's property, it is not proper to say that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner. Accordingly, the language of Section 70(c) has been revised so as to clarify its meaning and state more accurately what is intended." House Report No. 2320 on S. 2234, 82d Cong., 2d Sess., (1952) 16.

Section 70c of the Bankruptcy Act as it now stands, reads as follows:

> "• • • The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

APPENDIX 2

PERIPHERAL OR IRRELEVANT CASES CITED BY PETITIONER

Petitioner's brief is replete with a discussion of numerous case authorities which, in Respondent's submission, either deal with points which are not really at issue here or merely reflect and underscore the general understanding as to the function of Section 70c.

These cases are dealt with in this Appendix in order that the real question before this Court is not obscured by extraneous materials.

1. Cases dealing with the source of trustee's rights.

Petitioner cites *In re Kranz Candy Co.*, (7th Cir. 1954) 214 F. 2d 588; *In re Consorto Construction Co., Inc.*, (3rd Cir. 1954) 212 F. 2d 676; and *Miller v. Sulmeyer*, (9th Cir. 1959) 263 F. 2d 513; cert. den. 361 U. S. 838, 80 S. Ct. 55 (1959), to the general effect that the trustee's powers are not necessarily derived from the rights of existing creditors. Respondent has no quarrel with this statement as an abstract proposition of law, but as applied to the facts of the immediate case, this generality is of little utility. *Consorto* involved a chattel mortgage belatedly recorded (but recorded more than four months prior to bankruptcy) which was held valid against an attack by the trustee based on Section 70c. The chattel mortgage was void *ab initio* in *Kranz*, while *Miller v. Sulmeyer* involved a claim by the trustee based on rights of actual interim creditors having priority under state law and the court apparently sustained such claim upon the basis of Section 70e.

2. Cases dealing with the "Ideal Creditor" concept.

In re Urban, (7th Cir. 1943) 136 F. 2d 296, involved merely the normal application of Section 70c. Here, at state law, a creditor extending credit and obtaining a lien at date of bankruptcy would have obtained priority over the chattel mortgage since the mortgage was never properly filed.

In re Calhoun Supply Co., (D. C. Ala. 1911) 189 F. 537, is relied upon by Petitioner as authority that the trustee is invested with the rights of every type of creditor, real or hypothetical. The case, however, is nowhere near that broad. It was there argued that "unless the term 'creditor holding a lien by legal or equitable proceedings' must necessarily include the term 'judgment creditor' so that every creditor holding a lien by legal or equitable proceedings is bound to be a judgment creditor, then the 1910 amendment does not endue the trustee with the rights of a judgment creditor." It was to this argument that the Court was directing itself when, immediately preceding the language quoted by Petitioner (Br. p. 16), it said:

> "It is true that the words quoted from the amendment must necessarily include within their proper meaning a judgment creditor, but that is a very different thing from saying that they must be construed so as to include no other class of lienholders than judgment creditors. It is sufficient, if one of the class of creditors, coming within the fair meaning of the words, is that of judgment creditors, even though other classes of lienholders, not judgment creditors, may also come within the fair meaning of the words." 539

3. Cases represented by Petitioner to anticipate the *Constance* decision.

Sampsell v. Straub, (9th Cir. 1951) 194 F. 2d 228; *cert. den.* 343 U. S. 927, 72 S. Ct. 761, much relied upon by Petitioner as heralding the arrival of *Constance*, held simply that where the judgment lien given the trustee by Section 70c was required by state law to be recorded in order to gain priority over a homestead exemption, unrecorded at the time of filing the petition in bankruptcy, that the trustee would be deemed to have recorded. Thus stated, the holding is really quite similar to several cases supporting the doctrine that where state priority is given only to a creditor extending credit without notice of an unrecorded instrument which would have priority if recorded, the trustee under Section 70c has the status of a creditor without notice. (See, e. g. *Commercial Credit Co., Inc. v. Davidson*, (5th Cir. 1940) 112 F. 2d 54.) *Sampsell* merely substitutes recording for notice.

The discussion of *In re Urban* above has established that it merely represents an accepted application of Section 70c to avoid liens unprotected before date of bankruptcy.

Great stress is placed by Petitioner upon *McKay v. Trusco Finance Co. of Montgomery, Alabama*, (5th Cir. 1952) 198 F. 2d 431, yet *McKay* is quite compatible with the normal interpretation of Section 70c and not at all analogous to *Constance*. In *McKay*, the instrument (which the Court regarded as either a chattel mortgage or conditional sales contract) was *unrecorded* when the petition in bankruptcy was filed. Under state law, it was void as against judgment creditors if a conditional sales contract and as against creditors without notice if a chattel mortgage. There was no need to employ any fiction of extending credit at a time earlier than the filing of the petition in

bankruptcy and, there apparently being no actual creditor who could have upset the chattel mortgage or conditional sales contract, the court quite properly invoked Section 70c. That the court treated the trustee as a creditor without notice is not at all surprising nor is its holding that the status of the trustee as a creditor with a lien necessarily embraces a simple creditor.

Further, Petitioner's view that *McKay* anticipated *Constance* is definitely not shared by the 5th Circuit Court of Appeals which decided *McKay*, for in the more recent decision, *Blackford v. Commercial Credit Corporation* (5th Cir. 1959) 263 F. 2d 97, at Note 14 on pp. 111 and 112, the Court stated as follows:

> "'[14] Collier states that Section 70c may be of little help, 4 *Collier, Bankruptcy*, Sec. 70.55 at 1286 (14th ed. 1956). *We would not wish to predict our ruling now, but* the widespread criticism of *Constance v. Harvey*, 2 Cir., 1954, 215 F. 2d 571, and *Conti v. Volper*, 2 Cir., 1956, 229 F. 2d 317, see 4 *Collier, supra*, Supplement, additions to pp. 1258, citing *Marsh, Constance v. Harvey—The 'Strong-Arm Clause' Re-Evaluated*, 43 Calif. L. Rev. 65 (1955); 1270, n. 2; 1272; 1274, at least suggest that if Alabama law finally declares that collection cuts off all creditors except, say, (1) existing or (2) subsequent to assignment but prior to collection, we should *be certain that reasonable reconstruction of Section 70(c) justifies a result which might otherwise be extremely artificial.*" (Emphasis supplied.)

SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1960.

Wm. G. Lewis, Trustee, Petitioner, *v.* Manufacturers National Bank of Detroit.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January 9, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

The bankrupt borrowed money from respondent on November 4, 1957, giving as security a chattel mortgage on an automobile. In Michigan, where the transaction took place, mortgages were void as against creditors of the mortgagor unless filed with the Register of Deeds [1] with a special dispensation to purchase money mortgages if filed within 14 days of the execution of the mortgage. This mortgage, however, was not a purchase money mortgage; and though executed on November 4, 1957, it was not recorded until November 8, 1957.

Over five months later—on April 18, 1958—the borrower filed a voluntary petition in bankruptcy and an adjudication of bankruptcy followed, petitioner being named trustee.

There was no evidence that any creditor had extended credit between November 4, the date of the execution of the mortgage, and November 8, the date of its recordation. But since the mortgage had not been recorded immediately, the referee held that it was void as against

[1] Mich. Comp. L. 1948, § 566.140, as amended by Pub. Acts 1957, No. 233. In 1959, by Pub. Acts 1959, No. 110, a 10-day grace period was given to all mortgagees *vis-a-vis* creditors.

the trustee. The referee relied upon § 70 (c) of the Bankruptcy Act, 11 U. S. C. § 110 (c) which, so far as material here, reads:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

He ruled that § 70 (c) "clothes the Trustee with the rights of a creditor who could have obtained a lien at the date of bankruptcy whether or not such a creditor exists." He concluded that under Michigan law a creditor could have taken prior to the mortgage had he extended credit during the four-day period when the mortgage was "off record" and that therefore the trustee can claim the same rights, even though there was no such creditor. The District Court overruled the referee and the Court of Appeals affirmed the District Court. 275 F. 2d 454. The case is here on a petition for a writ of certiorari which we ganted because of a conflict between that decision and *Constance* v. *Harvey*, 215 F. 2d 571, decided by the Court of Appeals for the Second Circuit and subsequently followed by the same court in *Conti* v. *Volper*, 229 F. 2d 317. 363 U. S. 837.

Petitioner's case turns on the words, "upon which a creditor of the bankrupt could have obtained a lien . . . whether or not such a creditor actually exists," contained in § 70 (c).

Prior to 1910 the trustee had no better title to the property than the bankrupt had. See *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, 352; *Zartman* v. *First National Bank*,

216 U. S. 134, 138. The provision with which we are here concerned was written into the law in 1910 to give the trustee all the rights of an ideal judicial lien creditor.[2]

The predecessor of the present § 70 (c) was § 47 (a)(2) of the 1910 Act which provided in relevant part:

> ". . . such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

That language was held to give the trustee the status of a creditor "as of the time when the petition in bankruptcy was filed." *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 276.

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[2] See MacLachlan, Bankruptcy (1956), p. 187. The Committee Report concerning the 1910 Amendment said:

"It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the state law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee." H. R. Rep. No. 511, 61st Cong., 2d Sess., p. 7.

In 1938 the relevant provisions of § 47 (a)(2) were transferred to § 70 (c) with no material change.[3]

In 1950 § 70 (c) was recast to read as follows:

> ". . . The trustee, as to all property of the bankrupt at the date of bankruptcy, whether or not coming into possession or control of the court, shall be vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists."

Thus the distinction between property in the possession of the bankrupt as of the date of bankruptcy and other property was abolished; and the trustee was given the status of a creditor holding a lien through legal or equitable proceedings as to both types of property. This 1950 Amendment, however, created an anomaly. The House Report[4] accompanying a 1952 amendment that cast § 70 (c) in its present form states:

> ". . . it is now recognized that the amendment did not accurately express what was intended. Since the trustee already has title to all of the bankrupt's property, it is not proper to say that he has the rights of a lien creditor upon his own property. What should be said is that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner. Accordingly, the language of section § 70 (c) has been revised so as to clarify its meaning and state more accurately what is intended."

We think that one consistent theory underlies the several versions of § 70 (c) which we have set forth, *viz.*, that the rights of creditors—whether they are existing or hypo-

[3] See MacLachlan, Bankruptcy (1956), p. 187; H. R. Rep. No. 1409, 75th Cong., 1st Sess., pp. 4, 34–35.

[4] H. R. Rep. No. 2320, 82d Cong., 2d Sess., p. 16.

thetical—to which the trustee succeeds are to be ascertained as of "the date of bankruptcy," [5] not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition of bankruptcy is filed. We read the statutory words "the rights . . . of a judgment creditor [existing or hypothetical] then holding a lien" to refer to that date.[6]

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[5] While § 70 (c) speaks of "the date of bankruptcy," that term is defined as "the date when the petition was filed." Section 1 (13), 11 U. S. C. § 1 (13).

[6] After the decision in *Constance* v. *Harvey*, 215 F. 2d 571, 575, Congress passed a bill to change its holding. The President vetoed the bill stating:

"I have withheld my approval of H. R. 7242, to amend sections 1, 57j, 64a (5), 67b, 67c, and 70c of the Bankruptcy Act, and for other further purposes.

"I recognize the need for legislation to solve certain problems regarding the priority of liens in bankruptcy, but this bill is not a satisfactory solution. It would unduly and unnecessarily prejudice the sound administration of Federal tax laws. In some cases, for example, mortgages would be given an unwarranted priority over Federal tax liens even though the mortgage is recorded after the filing of the tax lien.

"This and other defects of the bill can, I believe, be corrected without compromising its primary and commendable purpose." Cong. Rec., 86th Cong., 2d Sess., No. 15, Pt. 2, App. A7013.

The Committee Report, urging that amendment, made clear the inequity that might often result if § 70 (c) is construed as *Constance* v. *Harvey*, *supra*, construed it:

"The holding in *Constance* v. *Harvey*, by injecting into section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of *Constance* v. *Harvey*. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect

This construction seems to us to fit the scheme of the Act.[7] Section 70 (e) enables the trustee to set aside fraudulent transfers which creditors having provable claims could void. The construction of § 70 (c) which petitioner urges would give the trustee power to set aside transactions which no creditor could void and which injured no creditor. That construction would enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy.

It is true that in some instances the trustee has rights which existing creditors may not have. Section 11, 11 U. S. C. § 29, gives him two years to institute legal proceedings regardless of what limitations creditors might have been under. Section 60, 11 U. S. C. § 96, gives him the right to recover preferential transfers made by the bankrupt within four months whether or not creditors had that right by local law. A like power exists under § 67 (a), 11 U. S. C. § 107 (a), as respects the invalidation of judicial liens obtained within four months of bankruptcy when the bankrupt was insolvent. Section 67 (d), 11 U. S. C. § 107 (d), carefully defines transactions which may be voided if made "within one year prior to the filing" of the petition.

Congress in striking a balance between secured and unsecured creditors has provided for specific periods of

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transfers. The doctrine of *Constance* v. *Harvey* presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the act. Moreover, this is a threat which is not required by the policy of the act, since the creditors who have been prejudiced by the imperfections of a transfer are normally protected under section 70e." H. R. Rep. No. 745, 86th Cong., 1st Sess., pp. 8–9.

[7] See Seligson, Creditors' Rights, Journ. Nat'l. Assoc. Referees in Bankruptcy, Oct. 1957, 113, 118; Marsh, *Constance* v. *Harvey*—"The Strong-Arm Clause" Re-Evaluated, 43 Cal. L. Rev. 65; Note, 57 Mich. L. Rev. 1227.

repose beyond which transactions of the bankrupt prior to bankruptcy may no longer be upset—except and unless existing creditors can set them aside.[8] Yet if we construe § 70 (c) as petitioner does, there would be no period of repose. Security transactions entered into in good-faith years before the bankruptcy could be upset if the trustee were ingenious enough to conjure up a hypothetical situation in which a hypothetical creditor might have had such a right. The rule pressed upon us would deprive a mortgagee of his rights in states like Michigan, if the mortgage had been executed months or even years previously and there had been a delay of a day or two in recording without any creditor having been injured during the period when the mortgage was unrecorded.

That is too great a wrench for us to give the bankruptcy system, absent a plain indication from Congress which is lacking here.

Affirmed.

MR. JUSTICE HARLAN: As the judge who wrote for the Court of Appeals in *Constance* v. *Harvey*, 215 F. 2d 571, I think it appropriate to say that I have long since come to the view that the second opinion in *Constance*, 215 F. 2d 575, was ill-considered. I welcome this opportunity to join in setting the matter right.

[8] See, *e. g.*, § 70e, concerning which H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 32, stated, "... under section 70(e) the trustee may avoid any transfer which any creditor might have avoided under applicable State law, and there is no time limitation in such case."